American Indian Law Review

Volume 44 | Number 2

2020

Tribal Remedies, Exhaustion, and State Courts

Pete Heidepriem

TRIBAL REMEDIES, EXHAUSTION, AND STATE COURTS

Pete Heidepriem[*]

A bedrock feature of sovereignty is a court exercising jurisdiction.[1] For Native nations, this is at risk. Through its judicial institution, a sovereign nation supports the force and effect of its laws, promotes respect for authority, and maintains culture.[2] A rule in federal law, which this Article calls the "tribal remedies doctrine," provides vital support to tribal judiciaries: it requires litigants to exhaust tribal court remedies before pursuing claims in a nontribal court. While the doctrine is mandatory in federal court, state courts across the country have shown different perspectives on whether it applies to them. With growing disorder among state courts, tribal court authority varies throughout the country. Considering the importance of courts in Native nations, this result is not acceptable. Establishing a uniform approach is critical to supporting tribal sovereignty and preventing arbitrary geography from determining each tribe's authority. U.S. Supreme Court precedent, with special attention to *Iowa Mutual*, requires state courts to apply the tribal remedies doctrine. Separating the doctrine from the legal rules of administrative exhaustion and abstention confirms this conclusion and reveals that a pending tribal court action is not required before applying the tribal remedies doctrine in state courts.

I. Introduction

In 1985, the United States Supreme Court decided *National Farmers* and first announced the rule that litigants must exhaust tribal remedies before

---

` * Pete Heidepriem is an attorney in South Dakota, where he litigates a variety of civil cases and serves as a tribal prosecutor for the Lower Brule Sioux Tribe. For thoughtful edits and interest in this article, thanks to the *American Indian Law Review*. Thanks as well to the people who took the time to read this in its very early forms: Judge Jeffrey Viken, Judge Patricia Sullivan, Eric Schlimgen, Alexander Ball, and the sharpest reader the author knows, Kelly Wong.

1. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14–18 (1987).

2. Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part I of II)*, 46 AM. J. COMP. L. 287, 293 (1998); Frank Pommersheim & Sherman Marshall, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 429–34.

pressing their cases in a nontribal court.[3] Most courts now refer to the rule as the tribal court exhaustion doctrine. Since *National Farmers*, the Supreme Court has provided further comment on the rule only a few times.[4]

As lower courts applied the doctrine, its general outline and underlying rationales became settled law, but the finer contours proved to be less straightforward. Two questions emerged as particularly divisive. First, does the doctrine, originally directed at federal courts, apply to state courts? And second, is a pending tribal court suit a prerequisite to invoking the doctrine?

Courts and scholars come to many different conclusions on these questions. To varying degrees, courts in eighteen states have substantively addressed the doctrine's applicability.[5] The Utah Supreme Court's 2017 decision in *Harvey v. Ute Tribe* is the latest comprehensive analysis of this question in a state court.[6] Many more state and federal court decisions sort through the necessity of a pending case in tribal court. Since 2009, the Supreme Court declined to hear two cases presenting the issue of the doctrine's state court application.[7] The most recent instance was *Harvey*, and before the Supreme Court denied that petition for writ of certiorari in January 2019, it issued an order inviting a brief from the Office of the United States Solicitor General setting out the views of the United States.[8] The Solicitor General filed a brief in December 2018, recommending denial of the petition and providing thorough and previously unknown positions on these two key issues of the doctrine; specifically, that the doctrine might apply to state courts, and that it likely requires an already-filed tribal case.[9]

Names are important, so a point about them must be made at the outset. Sometimes courts establish and label a legal doctrine, and as the doctrine develops, a gap grows between the name and the substantive principles. For

---

3. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 855–57 (1985).

4. *See, e.g.*, *Iowa Mut.*, 480 U.S. at 14–19; Strate v. A-1 Contractors, 520 U.S. 438, 448–53 (1997); *see also* Nevada v. Hicks, 533 U.S. 353, 369 (2001); El Paso Nat. Gas Co. v. Neztsosie, 526 U.S. 473, 483–85 (1999).

5. *See infra* Part III; *see infra* Appendix I.

6. Harvey v. Ute Indian Tribe of Uintah & Ouray Reservation, 2017 UT 75, 416 P.3d 401, *cert. denied*, 139 S. Ct. 784 (2019).

7. *Harvey*, 139 S. Ct. 784; Coushatta Tribe of La. v. Meyer & Assocs., Inc., 556 U.S. 1166 (2009).

8. U.S. Supreme Court, Order List: 585 U.S. (June 25, 2018), https://www.supreme court.gov/orders/courtorders/062518zor_g3bh.pdf.

9. Brief for the United States as Amicus Curiae, Harvey v. UTE Indian Tribe of the Uintah & Ouray Reservation, 416 P.3d 401 (2019) (No. 17-1301), 2018 WL 6382963, at *12, *18; *see infra* Section III.D.5(a)(2).

instance, the doctrine of fraudulent joinder is widely described as a misnomer.[10] It relates to pleading strategies to avoid federal jurisdiction, not actual fraud.[11] Similarly, using the title "exhaustion of tribal remedies" breeds confusion because it brings to mind the well-established doctrine of exhaustion of administrative remedies.[12] This disconnect has prompted scholars and judges to frequently discuss them together.[13] Later, this Article conducts a side-by-side analysis of the two doctrines and explains some core distinctions.[14] From this point on, the Article will use the terms "tribal remedies doctrine," "tribal exhaustion," or simply, "the doctrine" to address this issue. The reasoning that follows seeks to provide a basis for this name adjustment and highlight a path forward for preserving doctrinal integrity.[15]

In Part II, this Article sets forth the tribal remedies doctrine, with a brief history of its roots and discussion of the leading Supreme Court cases. Part III lays out the assortment of state court decisions engaging with the doctrine, giving special emphasis to the *Harvey* case. Next, Part IV contrasts the doctrine with the legal rules of administrative exhaustion and abstention to show that the doctrine lacks a fitting analog. Parts V and VI respectively establish the positions that the tribal remedies doctrine applies to state courts and that a pending tribal court case need not be a prerequisite.

---

10. Schur v. L.A. Weight Loss Ctrs., Inc., 577 F.3d 752, 763 n.9 (7th Cir. 2009) ("As many courts have noted, the term 'fraudulent joinder' is a bit of a misnomer—the doctrine requires neither fraud nor joinder.") (citations omitted).

11. James F. Archibald III, Note, *Reintroducing "Fraud" to the Doctrine of Fraudulent Joinder*, 78 VA. L. REV. 1377, 1387 (1992); *see also* Matthew J. Richardson, *Clarifying and Limiting Fraudulent Joinder*, 58 FLA. L. REV. 119, 130 n.62 (2006).

12. *See infra* Part IV for a discussion of the administrative exhaustion doctrine.

13. *See id.*

14. The Article also compares two abstention doctrines: *Colorado River* and *Younger*. *See id.* As discussed *infra*, separating out these different legal rules elucidates the roots of the tribal remedies doctrine and whether it has a role in state courts. Changing the name to the tribal remedies doctrine is essential to achieving greater analytical clarity.

15. Speaking of names, this Article uses the legal terms of art "Indian" and "Indian Country" where necessary. "The word 'Indian' has become a legal term of art with varying definitions depending on the context." St. Cloud v. United States, 702 F. Supp. 1456, 1460 (D.S.D. 1988); *see also* F.T.C. v. Payday Fin., LLC, 935 F. Supp. 2d 926, 929 n.1 (D.S.D. 2013). *See generally* 18 U.S.C. § 1151 (2018) (defining "Indian country"); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.03, at 170–83 (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN] (defining "Indian"); *id.* § 3.04, at 183–202 (defining "Indian country"); Ryan Fortson, *Advancing Tribal Court Criminal Jurisdiction in Alaska*, 32 ALASKA L. REV. 93, 108–09 (2015) (describing categories of land within Indian Country).

II. The Tribal Remedies Doctrine

A. Brief Background on Tribal Courts

Beyond dispute: Native nations are sovereigns whose existence and powers preceded the creation of the United States government.[16] Since the founding of the United States, there has been an ongoing process of determining the relationship and balance of power between tribes and the federal government.[17] Two principles underlie the development of that balance: first, the federal government's trust responsibility to tribes, and second, the federal policy of supporting tribal self-government.[18] Three Supreme Court decisions authored by Chief Justice John Marshall set the groundwork for the trust responsibility—*Johnson v. M'Intosh*; *Cherokee Nation v. Georgia*; and *Worcester v. Georgia*.[19] A key aspect of *Cherokee Nation* was the decision to "denominate[]" Native nations as "domestic dependent nations,"[20] which continues to be at the front of federal Indian law today.[21] Central to this "dependent" status is Congress' plenary control over tribal authority.[22] For example, federal courts have recognized the tribes' inherent immunity from suit—a fundamental feature of sovereignty—for over one century, and the default position is that tribes are immune from suit unless Congress unequivocally expresses its intent to abrogate that power.[23] The trust responsibility "encourages federal facilitation of the development of tribal institutions and infrastructure," in part by "providing impetus for legislation furthering, among other issues, Indian education, health care, and self-governance."[24]

---

16. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014).

17. *See* Samuel E. Ennis & Caroline P. Mayhew, *Federal Indian Law and Tribal Criminal Justice in the Self-Determination Era*, 38 AM. INDIAN L. REV. 421, 425–32 (2013-2014).

18. *See id.* at 425–26.

19. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). For a more in-depth description of the cases, see Fortson, *supra* note 15, at 105–08; *id.* at 114 ("From the Marshall Trilogy we get the underlying principles of much of subsequent American Indian law: American Indians have limited title to their land in the form of 'aboriginal title'; the federal government has a trust relationship obligation toward American Indians; and federal Indian law is supreme over that of states.").

20. *Cherokee Nation*, 30 U.S. at 17.

21. *Bay Mills*, 572 U.S. at 788.

22. *Id.*

23. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (citing Turner v. United States, 248 U.S. 354, 358 (1919)); *Bay Mills*, 572 U.S. at 788.

24. Ennis & Mayhew, *supra* note 17, at 425–26.

The United States' current support for tribal self-government was a "direct response to the so-called Termination Era of the 1940s and 1950s[.]"[25] During that era, "Congress moved to withdraw responsibility for a number of Indian tribes, along with it recognition of their special legal status; attempted to extend state jurisdiction over many more tribes; and ultimately sought to assimilate all Indians into the broader polity."[26] Congress expressed the country's self-governance policy in the Indian Self-Determination and Education Assistance Act, which promotes tribal control over local law enforcement, the Bureau of Indian Affairs, and the Indian Health Service.[27] The Supreme Court's creation of the tribal remedies doctrine accords with this overarching policy.[28] Congress now prioritizes "enhancing tribal court systems and improving access to those systems [to] serve[] the dual Federal goals of tribal political self-determination and economic self-sufficiency."[29]

While these general principles still guide today's interpretations of federal Indian law, tribal courts existed before the country's founding.[30] The Supreme Court opinions Chief Justice Marshall penned in the early 1800s acknowledged tribal judicial systems.[31] Like their state and federal counterparts, tribal courts play a vital role in tribal government—the resolution of disputes and the interpretation of laws.[32] Congress and the federal courts, however, have placed certain limitations on the jurisdiction of tribal courts.[33] With respect to civil jurisdiction, cases arising in Indian Country between Indian people or against an Indian defendant will generally be subject to the tribal court's exclusive jurisdiction.[34] The

25. *Id.* at 426 (quoting Bethany R. Berger, Williams v. Lee *and the Debate over Indian Equality*, 109 MICH. L. REV. 1463, 1466 (2011)).

26. *Id.*

27. 25 U.S.C. §§ 5301–5423 (2018); *see* Ennis & Mayhew, *supra* note 17, at 426–27.

28. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14–18 (1987).

29. 25 U.S.C. § 3651(7) (2018).

30. Cooter & Fikentscher, *supra* note 2, at 298–302.

31. *Id.* at 299–300; Blake A. Watson, *The Curious Case of Disappearing Federal Jurisdiction over Federal Enforcement of Federal Law: A Vehicle for Reassessment of the Tribal Exhaustion/Abstention Doctrine*, 80 MARQ. L. REV. 531, 547–49 (1997).

32. Cooter & Fikentscher, *supra* note 2, at 299–302; *Tribal Courts*, TRIBAL CT. CLEARINGHOUSE, https://www.tribal-institute.org/lists/justice.htm (last visited Aug. 2, 2019).

33. Because the subtleties of tribal court jurisdiction are not the centerpiece of this Article, it does not delve into the many permutations of facts that raise questions about whether tribal courts can exercise authority. This brief overview covers what is necessary for an engaged discussion of the tribal remedies doctrine.

34. Sanders v. Robinson, 864 F.2d 630, 632 (9th Cir. 1988); *see* 42 C.J.S. *Indians* § 62 (2010).

Supreme Court's decision in *Montana v. United States* "is the pathmarking case concerning tribal civil authority over nonmembers."[35] In *Montana*, the Court delineated

> a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare.[36]

As to criminal jurisdiction, the inherent power of a tribe provides its courts with jurisdiction over Indian people in Indian Country.[37] With the exception of the jurisdiction granted through the Violence Against Women Act, non-Indian people in Indian Country are not subject to tribal court criminal jurisdiction.[38] Federal courts have jurisdiction over much of the crimes committed in Indian Country. The General Crimes Act applies federal jurisdiction to Indian Country as it pertains to federal enclaves like federal courthouses and military bases.[39] And the Major Crimes Act establishes federal jurisdiction over certain felonies committed in Indian Country.[40] Whether a state court may exercise criminal jurisdiction over crimes in Indian Country depends on the particular state. Congress passed Public Law 280 in 1953, which "required certain state governments to assume what would otherwise be federal criminal jurisdiction over Indian

35. Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997); *see* Montana v. United States, 450 U.S. 544 (1981).

36. *Strate*, 520 U.S. at 446.

37. *See* Ennis & Mayhew, *supra* note 17, at 432. The tribal remedies doctrine does not concern itself with criminal jurisdiction, so the overview provided here is for the purpose of giving full context to the function of tribal courts and their relationship with state and federal courts.

38. Ennis & Mayhew, *supra* note 17, at 422; *see* Violence Against Women Reauthorization Act of 2013 tit. IX, § 904, 25 U.S.C. § 1304 (2018).

39. Ennis & Mayhew, *supra* note 17, at 429.

40. *Id.* at 429 n.49 ("These fourteen crimes are murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [crimes of sexual abuse], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, an assault against an individual who has not attained the age of sixteen years, felony child abuse or neglect, arson, burglary, and robbery.") (citing 18 U.S.C. § 1153 (2018)).

country."[41] Other specified states could elect to assume the same authority, which requires consent of the tribe pursuant to the Indian Civil Rights Act.[42]

This brief background shows that the balance between tribal, state, and federal courts is complicated and in constant development. The Supreme Court's decision in *Williams v. Lee* proved to be an essential moment in history that teed up the creation of the tribal remedies doctrine.[43] In 1959, the Court issued *Williams v. Lee*, a case where the Arizona state courts exercised jurisdiction over a dispute for goods sold from a non-Indian person to a Navajo tribal member on the Navajo Nation.[44] The state court refused to dismiss the case on jurisdictional grounds, and the tribal member appealed to the Supreme Court arguing that the suit should be in tribal court.[45] The Supreme Court unanimously reversed.[46] The Court held that Chief Justice Marshall's opinion in *Worcester v. Georgia* and the cases flowing from that decision establish the principle that, "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[47] Finding it "immaterial" that the respondent was not a tribal member, the Court concluded "[t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."[48]

Following the Supreme Court's *Williams v. Lee* decision, the definitive moment for the tribal remedies doctrine came with its formal announcement in *National Farmers*.

---

41. Ennis & Mayhew, *supra* note 17, at 430. Public Law 280 also grants state courts concurrent authority over some civil cases where tribal courts have jurisdiction. *See* COHEN, *supra* note 15, § 6.04[3][b][i], at 539–40.

42. Ennis & Mayhew, *supra* note 17, at 430–31 (citing Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 699–701 (2006)).

43. 358 U.S. 217 (1959).

44. *Id.* at 217–18.

45. *Id.*

46. *Id.* at 223.

47. *Id.* at 218–20.

48. *Id.* at 223.

B. National Farmers

National Farmers was a case grounded in federal question jurisdiction under 28 U.S.C. § 1331.[49] The federal issue was "whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court."[50] The case arose from a motorcycle striking and injuring Leroy Sage, a member of the Crow Tribe, in the parking lot of a school located on land owned by Montana but within the exterior boundaries of the Crow Indian Reservation.[51]

Sage commenced a lawsuit against the school district, an arm of the state, in Crow Tribal Court.[52] After process was served, the defendant did not take action and eventually the tribal court entered final judgment in Sage's favor.[53] To keep the judgment from taking effect, the school and its insurer initiated an action in U.S. District Court for the District of Montana, seeking a temporary restraining order.[54] The district court issued a temporary restraining order blocking the tribal court's judgment and its exercise of jurisdiction over the case Sage filed.[55] Later, the district court imposed a preliminary injunction against execution of the Crow Tribal Court's judgment and determined that the tribal court lacked subject matter jurisdiction.[56] The U.S. Court of Appeals for the Ninth Circuit reversed because it determined that the district court lacked an adequate basis for jurisdiction over the case.[57] One circuit judge dissented in part and concurred in the result, finding that the district court had jurisdiction under § 1331, but that the case should still be dismissed because the insurer and school district failed to exhaust tribal court remedies by appealing the tribal court judgment.[58]

---

49. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2018). This is one of the two statutory bases for federal court subject matter jurisdiction; the other is diversity jurisdiction. *See infra* note 73; Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 11 (1987) (discussing 28 U.S.C. § 1332).

50. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 852 (1985).

51. *Id.* at 847.

52. *Id.*

53. *Id.* at 847–48.

54. *Id.* at 848.

55. *Id.*

56. *Id.* at 848–49.

57. *Id.* at 849.

58. *Id.*

The Supreme Court unanimously reversed the Ninth Circuit.[59] The Court held that the "question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331."[60] In approaching the case's federal question, the Supreme Court determined that the tribal court had a legitimate claim to jurisdiction.[61] The Court explained that "the existence and extent of a tribal court's jurisdiction" is an inquiry that "will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions."[62] "[T]hat examination[,]" the Court held, "should be conducted in the first instance in the Tribal Court itself."[63]

The Court provided three reasons for this determination. First, Congress' policy of "supporting tribal self-government and self-determination . . . favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge."[64] Second, "the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed."[65] When "the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction[,]" the tribal judicial system has the chance "to rectify any errors it may have made."[66] And third, this rule will "encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review."[67]

National Farmers also established three exceptions. First, a party need not litigate in tribal court if the invocation of tribal jurisdiction "is

59. *Id.* at 828.
60. *Id.* at 852.
61. *Id.* at 853–56.
62. *Id.* at 855–56.
63. *Id.* at 856.
64. *Id.* (citing, inter alia, Williams v. Lee, 358 U.S. 217, 223 (1959)); *see supra* notes 44–48 (citing *Williams v. Lee*).
65. *Nat'l Farmers Union*, 471 U.S. at 856.
66. *Id.* at 857.
67. *Id.*

motivated by a desire to harass or is conducted in bad faith."[68] Second, there is no need to proceed in tribal court when it "is patently violative of express jurisdictional prohibitions."[69] And third, exhaustion is not necessary if it "would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction."[70]

The Court finished with procedural guidance to lower courts. If a lower court finds that tribal exhaustion did not occur, the lower court may dismiss or stay the case "pending the development of further Tribal Court proceedings."[71] After the tribal judicial process runs its course, the federal trial court may review the final decision.[72]

C. Iowa Mutual

In 1987, the U.S. Supreme Court decided *Iowa Mutual*, the next authoritative decision regarding tribal exhaustion. *Iowa Mutual* came before the Court on the question of whether the tribal remedies doctrine applies to a case where the federal trial court exercises diversity jurisdiction pursuant to 28 U.S.C. § 1332.[73] Like *National Farmers*, the case started with a motor vehicle accident in Montana.[74] Edward LaPlante, a member of the Blackfeet Indian Tribe, worked on a ranch within the Blackfeet Indian Reservation's boundaries and filed suit against his employer and its insurer in Blackfeet Tribal Court to recover for his injuries.[75] The tribal court denied the insurer's motion to dismiss the case for lack of jurisdiction; instead of waiting for a decision on the merits and appealing, the insurer initiated a federal court action in the District of Montana claiming jurisdiction based on diversity of citizenship under § 1332.[76] The federal case sought a court declaration that the insurer did not have to pay for LaPlante's injuries.[77]

---

68. *Id.* at 856 n.21 (quoting Juidice v. Vail, 430 U.S. 327, 338 (1977)); *see also* R. Mitchell McGrew, Note, *Analysis of a Bias-Based Exception to the Doctrine of Exhaustion in* Wilson v. Bull, 39 AM. INDIAN L. REV. 617, 624 (2014-2015).

69. *Nat'l Farmers Union*, 471 U.S. at 856 n.21.

70. *Id.*

71. *Id.* at 857.

72. *Id.*

73. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 11 (1987); *see* 28 U.S.C. § 1332(a) (2018) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States . . . .").

74. *Iowa Mut.*, 480 U.S. at 11.

75. *Id.*

76. *Id.* at 12–13.

77. *Id.*

When LaPlante moved to dismiss the case on subject matter jurisdiction grounds, the district court granted the motion and highlighted the need to exhaust tribal remedies.[78] The Ninth Circuit affirmed, and the Supreme Court granted certiorari.[79]

At the outset, the Court reemphasized the core of the doctrine—"the Federal Government's longstanding policy of encouraging tribal self-government."[80] Integral to this policy, "tribes retain 'attributes of sovereignty over both their members and their territory,' to the extent that sovereignty has not been withdrawn by federal statute or treaty."[81] Using state sovereignty to illustrate this point, *Iowa Mutual* explained that the "federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute."[82] The Court then echoed *Williams v. Lee*'s holding that, "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[83]

Building on that foundation, the Court stated, "Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development."[84] To underscore this point, the Court highlighted that, "[i]f state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law."[85]

The Court then turned to the issue presented and held that exhaustion in tribal courts is necessary when jurisdiction is based on § 1332.[86] In fact, "[r]egardless of the basis for jurisdiction," the rule articulated in *National Farmers* requires that the case go to tribal court.[87] It is the "unconditional access" to a federal forum outside of the tribal judiciary that generates "direct competition with the tribal courts, thereby impairing the [tribal

78. *Id.* at 13.
79. *Id.* at 13–14.
80. *Id.* at 14.
81. *Id.* (citation omitted) (quoting United States v. Mazurie, 419 U.S. 544, 577 (1975)).
82. *Id.*
83. *Id.* (internal alteration omitted) (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).
84. *Id.* at 14–15 (citation omitted).
85. *Id.* at 15 (citing *Williams*, 358 U.S. at 220).
86. *Id.* at 16.
87. *Id.*

courts'] authority over reservation affairs."[88] Elaborating on this holding, *Iowa Mutual* found that "[a]djudication of such matters by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law."[89]

The Supreme Court reversed the Ninth Circuit's determination that there was no subject matter jurisdiction. Explaining *National Farmers* as a case that announced a "prudential rule[,]" the Court held that "considerations of comity direct that tribal remedies be exhausted."[90] So pursuing tribal court remedies "is required as a matter of comity, not as a jurisdictional prerequisite."[91] *Iowa Mutual* found that this made the doctrine "analogous to principles of abstention."[92]

Additionally, *Iowa Mutual* provided some practical clarifications. It made clear that the completion of appellate review in the tribe's judiciary is necessary.[93] And the Court reaffirmed *National Farmers*' holding that federal courts have authority to review tribal court jurisdictional determinations after exhaustion.[94]

Only Justice John Paul Stevens wrote a separate opinion, which concurred in part and dissented in part. Although the opinion concurred with the majority that there was subject matter jurisdiction, Justice Stevens dissented from the exhaustion analysis.[95] In Justice Stevens' view, the fact of concurrent jurisdiction between federal and tribal courts is not sufficient for mandating exhaustion of the tribal judicial process.[96] Because the insurer's federal case related to "the coverage of the insurance policy[,]"

---

88. *Id.*

89. *Id.*

90. *Id.* at 15, 21 n.14.

91. *Id.* at 21 n.8.

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist., 482 U.S. 522, 544 (1987) (quoting Hilton v. Guyot, 159 U.S. 113, 163–64 (1895)).

92. *Iowa Mut.*, 480 U.S. at 16 n.8 (citing Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976)); *see infra* Part III.

93. *Iowa Mut.*, 480 U.S. at 16–17.

94. *Id.* at 19.

95. *Id.* at 20–21 (Stevens, J., concurring in part and dissenting in part).

96. *Id.*

Justice Stevens concluded it "raises no question concerning the jurisdiction of the Blackfeet Tribal Court."[97]

The dissenting aspect of the opinion understood the *National Farmers* decision to turn on the fact that a litigant is actively challenging tribal court jurisdiction.[98] It noted that "a similar exhaustion requirement [is enforced] in cases challenging the jurisdiction of state tribunals."[99] "[A]s between state and federal courts," Justice Stevens explained, "the general rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . .'"[100] By requiring tribal exhaustion without a direct challenge to tribal jurisdiction, Justice Stevens found the Court advanced "the anomalous suggestion that the sovereignty of an Indian tribe is in some respects greater than that of the State of Montana."[101]

D. Strate

The last robust discussion of the tribal remedies doctrine by the Supreme Court came in the 1997 decision *Strate v. A-1 Contractors*. The case arose from an automobile collision between Gisela Fredericks and Lyle Stockert on a highway in North Dakota.[102] It occurred at a point on the road within the Fort Berthold Indian Reservation, in a stretch of highway over which the United States granted North Dakota a right-of-way.[103] While neither driver was a tribal member, Fredericks' late husband and her five children were members of the Three Affiliated Tribes of the Fort Berthold Indian Reservation.[104]

Fredericks sued Stockert, his employer, and the employer's insurer in the tribal court of the Three Affiliated Tribes.[105] The suit included a loss of

97. *Id.* at 22
98. *Id.* at 21–22.
99. *Id.* at 21.
100. *Id.* at 22 (quoting McClellan v. Carland, 217 U.S. 268, 282 (1910)).
101. *Id.*
102. Strate v. A-1 Contractors, 520 U.S. 438, 442–43 (1997).
103. *Id.*
104. *Id.* at 443. The tribes are also known as the Mandan, Hidatsa, and Arikara Nation or the MHA Nation. *Our Tribe*, MHA NATION, https://www.mhanation.com/ (last visited Mar. 16, 2020). This Article refers to the tribal nation as the Three Affiliated Tribes. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 5019–25 (Jan. 29, 2016).
105. *Strate*, 520 U.S. at 443–44. For this discussion, the Article refers to Stockert, his employer, and the employer's insurer collectively as A-1 Contractors. When the automobile collision occurred, Stockert was driving a gravel truck A-1 Contractors owned. *Id.*

consortium claim advanced by Fredericks' children.[106] A-1 Contractors argued there was no subject matter jurisdiction and moved to dismiss.[107] The tribal court denied the motion, which was later affirmed when the jurisdictional determination was appealed to the Northern Plains Intertribal Court of Appeals.[108]

A-1 Contractors filed a federal lawsuit challenging the tribal proceedings, and once that case made its way to the Supreme Court, the core issue was whether the tribal court could exercise jurisdiction over Fredericks' case.[109] To answer that, the Supreme Court had to apply its *Montana* decision, which provides the decisive test for the limits of tribal civil authority.[110] The Court's decisions in *National Farmers* and *Iowa Mutual* became part of *Strate*'s analysis because Fredericks argued that those cases control and "broadly confirm tribal-court civil jurisdiction over claims against nonmembers arising from occurrences on any land within a reservation."[111] In rejecting Fredericks' position, the Court traced the contours of *National Farmers* and *Iowa Mutual*.[112]

The Court addressed *National Farmers* first. While *National Farmers* recognized "that tribal courts have more extensive jurisdiction in civil cases than in criminal proceedings, and . . . the need to inspect relevant statutes, treaties, and other materials" in assessing tribal court authority, *Strate* made clear that no part of *National Farmers* "limit[s] *Montana's* instruction."[113] Rather, *National Farmers* set forth "a prudential exhaustion rule, in deference to the capacity of tribal courts to explain to the parties the precise basis for accepting or rejecting jurisdiction."[114]

Turning to *Iowa Mutual*, the Court indicated the 1987 decision rested on the proposition that "[r]espect for tribal self-government made it appropriate to give the tribal court a full opportunity to determine its own

106. *Id.*
107. *Id.* at 444.
108. *See id.* at 445.
109. *Id.* at 442, 444.
110. *See supra* Section II.A.
111. *Strate*, 520 U.S. at 448.
112. Fredericks, along with the United States as amicus curiae, also argued that because the Court decided *Montana* in the context of tribal regulatory authority over nonmembers (i.e., issuance of hunting licenses), it does not squarely limit the adjudicatory authority of tribes. *Id.* at 447–48. *Strate* dismissed the argument. *Id.* at 453. The Court held that "[w]hile *Montana* immediately involved regulatory authority, the Court broadly addressed the concept of inherent sovereignty." *Id.* (internal quotation marks omitted).
113. *Id.* at 449.
114. *Id.* at 450 (internal quotation marks and alteration omitted).

jurisdiction."[115] *Strate* refused, however, to accept the argument that *Iowa Mutual* means "the *Montana* rule does not bear on tribal-court adjudicatory authority in cases involving nonmember defendants."[116] The Court clarified *Iowa Mutual* as holding the following: "where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts."[117]

E. Remaining Decisions

Since *National Farmers*, *Iowa Mutual*, and *Strate*, the Supreme Court has provided little guidance on the tribal remedies doctrine. The Court decided *Neztsosie* in 1999, which thoughtfully analyzed *National Farmers* before ultimately finding that the doctrine was inapplicable because "the comity rationale for tribal exhaustion normally appropriate to a tribal court's determination of its jurisdiction stops short of the Price-Anderson Act," the federal statute at issue, which contains an "unusual preemption provision."[118]

The 2001 decision of *Nevada v. Hicks* did not require tribal exhaustion because the Court determined there was no tribal court jurisdiction. *Hicks* described *Strate* as "add[ing] a broader exception" to the doctrine: exhaustion is not necessary "'when . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule,'" because it "would serve no purpose other than delay."[119] While not the opinion of the Court, Justice Sandra Day

115. *Id.* at 451 (internal quotation marks omitted).

116. *Id.* at 451–52.

117. *Id.* at 453 (internal quotation marks and alteration omitted).

118. El Paso Nat. Gas Co. v. Neztsosie, 526 U.S. 473, 484–85, 487 (1999) ("[T]he Price-Anderson Act transforms into a federal action 'any public liability action arising out of or resulting from a nuclear incident,' § 2210(n)(2). The Act not only gives a district court original jurisdiction over such a claim, but provides for removal to a federal court as of right if a putative Price-Anderson action is brought in a state court. Congress thus expressed an unmistakable preference for a federal forum, at the behest of the defending party, both for litigating a Price-Anderson claim on the merits and for determining whether a claim falls under Price-Anderson when removal is contested.") (citations omitted).

119. Nevada v. Hicks, 533 U.S. 353, 369 (2001). Rather than a "broader exception," this quoted portion of *Strate* may be understood as an explanation of how an exception established in *National Farmers* may apply. In *Strate*, the quote cites to the *National Farmers* footnote articulating the three exceptions. The *Strate* quote—holding that exhaustion is unnecessary when the tribal court clearly lacks jurisdiction—fits within the second *National Farmers* exception for cases where "the [tribal] action is patently violative of express jurisdictional prohibitions." Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 n.21 (1985).

O'Connor, in a concurrence joined by Justice Stevens and Justice Stephen G. Breyer, explained *National Farmers* and *Iowa Mutual* as relating to state courts—"In determining the relationship between tribal courts and state and federal courts, we have developed a doctrine of exhaustion based on principles of comity."[120]

Since the cases discussed above, the Supreme Court has touched on the tribal remedies doctrine in passing but has not tested its principles.[121] In the meantime, state courts have been grappling with the Supreme Court's rulings, and the array of outcomes shows that the doctrine is subject to different interpretations.

III. State Courts and the Doctrine's Applicability

On the issue of whether the tribal exhaustion doctrine applies to state courts, eighteen state courts have addressed the question to varying degrees of depth.[122] Five state courts held that the doctrine applies. Six might also come to that determination, but their decisions have not engaged with the doctrine such that they can be grouped with the five jurisdictions applying tribal exhaustion, so these six are labeled as "maybe." There are three state courts that address the doctrine's principles but do not decide the issue. Finally, in four states, the courts held the doctrine does not apply. The following section discusses these categories in reverse order, finishing with the Utah Supreme Court's *Harvey* decision.[123]

A. Does Not Apply: 4

1. Oklahoma

The Court of Civil Appeals of Oklahoma, the state's intermediate appellate court, held in *Michael Minnis & Associates, P.C. v. Kaw Nation* that "the exhaustion doctrine does not apply in state court actions."[124] Prior

120. *Hicks*, 533 U.S. at 398 (O'Connor, J., concurring in part and concurring in the judgment).

121. *See, e.g.*, Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 639 (2009).

122. *See* COHEN, *supra* note 15, § 6.04[3][c], at 559–61 (Nell Jessup Newton et al. eds., 2012) (discussing some state courts that have addressed the doctrine); *id.* § 7.04[3], at 630–36 (same).

123. Appendix I provides a visual depiction of the discussion in this section. Comparing Appendix II, which displays the presence of tribes in the country state-by-state, to Appendix I reveals that many states with tribes in their borders have yet to weigh in on the applicability of the tribal remedies doctrine.

124. Michael Minnis & Assocs., P.C. v. Kaw Nation, 2004 OK CIV APP 36, ¶ 18, 90 P.3d 1009, 1014.

to appeal, the trial judge dismissed the case against the Kaw Nation; the appellate decision does not reveal the basis for dismissal, but the motion to dismiss raised, inter alia, tribal sovereign immunity and exhaustion of tribal remedies.[125] The *Michael Minnis* court did not provide a detailed explanation for its conclusion on the tribal remedies doctrine.[126] However, the court viewed the case as turning on the issue of sovereign immunity and affirmed the trial judge's dismissal order in concluding the "state court action is barred" without "a valid, express waiver of tribal sovereign immunity by contract, the tribal government or Congressional authorization."[127]

2. Louisiana

The Louisiana Supreme Court issued a 2008 decision where it declined to apply the tribal remedies doctrine.[128] The court's then-Chief Justice, Pascal F. Calogero, Jr., concurred and specifically determined that the doctrine is inapplicable.[129] To support this conclusion, the concurrence cites the Oklahoma *Michael Minnis* decision and the U.S. Supreme Court case *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*.[130] The concurrence discusses *Kiowa Tribe* at length, noting how the decision centered on sovereign immunity and "does not even mention the exhaustion of tribal remedies doctrine in relation to a suit against an Indian Tribe filed in a state court."[131] "Based on that fact," Chief Justice Calogero "would find that the exhaustion doctrine does not apply in state courts."[132] Justice Catherine D. Kimball, joined by now-Chief Justice Bernette J. Johnson, issued a comprehensive dissenting opinion largely tracking the Connecticut Supreme Court's ruling in *Drumm v. Brown*.[133] Justice John L. Weimer dissented separately and appeared to support applying the doctrine without

125. *Id.* ¶¶ 7–20, 90 P.3d at 1012–14.

126. *Id.* ¶¶ 13–20, 90 P.3d at 1013–14.

127. *Id.* ¶ 21, 90 P.3d at 1015.

128. Meyer & Assocs., Inc. v. Coushatta Tribe of La., 2007-2256, p. 5 (La. 9/23/08); 992 So. 2d 446, 451–52.

129. *Id.*, 992 So. 2d at 452 (Calogero, C.J., additionally concurring and assigning additional reasons).

130. *Id.*, 992 So. 2d at 452–53.

131. *Id.*, 992 So. 2d at 452.

132. *Id.*

133. *Id.* at pp. 6–13, 992 So. 2d at 453–62 (Kimball, J. dissenting) (discussing Drumm v. Brown, 716 A.2d 50 (Conn. 1998), a leading state court case adopting the tribal remedies doctrine); *see infra* notes 175–78 and accompanying text.

expressly saying so.[134] Justice Weimer concluded that the tribal court must be the first to assess the sovereign immunity question,[135] but if there is a waiver, "the matter can then be returned to state court."[136]

3. Arizona

In *Astorga v. Wing*, an intermediate court in Arizona had a case where it determined it need not implement the tribal remedies doctrine.[137] The case involved "an Indian plaintiff fil[ing] suit in state court against a non-Indian defendant" and an ongoing parallel case in tribal court.[138] The plaintiffs appealed the state trial court's refusal to stay the state case, and the reviewing court found that "there is no need to invoke the exhaustion requirement to protect the ability of the tribal court to determine in the first instance the facts and the law pertaining to whether it has jurisdiction[,]" because "[t]he tribal court will presumably decide the jurisdictional issue in the parallel proceeding that is before it, as the exhaustion doctrine requires."[139] Citing a prior Arizona Supreme Court case, the court concluded that "the principle of exhaustion recognized by federal courts in this context does not similarly operate in Arizona state courts."[140]

4. Washington

In *Maxa v. Yakima Petroleum, Inc.*, a Washington intermediate appellate court found the tribal remedies doctrine inapplicable.[141] *Maxa* held that *National Farmers* and *Iowa Mutual* were inapposite because, unlike *Maxa*, those "cases involve federal jurisdiction issues[,]" and "[s]tate civil adjudicatory authority over litigation involving tribe members, on the other

134. *Id.* at p. 13, 992 So. 2d at 462 (Weimer, J., dissenting) ("Because I believe this threshold [sovereign immunity] question involving tribal law should be resolved by the tribal court, I would find the tribal court had jurisdiction to initially determine the validity of the agreements at issue.").

135. *Id.*

136. *Id.*

137. 118 P.3d 1103, 1106–08 (Ariz. Ct. App. 2005). *Astorga* is cited for this holding in *Harvey v. Ute Indian Tribe of Uintah & Ouray Reservation*, 2017 UT 75, ¶¶ 93–94, 416 P.3d 401 (Himonas, J., concurring), and *id.* ¶ 123 (Lee, A.C.J., concurring in part and dissenting in part).

138. *Astorga*, 118 P.3d at 1107.

139. *Id.*

140. *Id.* at 1106 (citing State v. Zaman, 946 P.2d 459, 463 (Ariz. 1997)).

141. Maxa v. Yakima Petroleum, Inc., 924 P.2d 372, 373 (Wash. Ct. App. 1996). *Maxa* is referred to for this proposition in *Harvey*, 2017 UT 75, ¶ 128 n.16 (Lee, A.C.J., concurring in part and dissenting in part), and Drumm v. Brown, 716 A.2d 50, 61 n.11 (Conn. 1998).

hand, is not specifically preempted by federal law."[142] The court additionally held that its choice to exercise jurisdiction accorded with *Williams v. Lee*, because the case involved a contract dispute the state had an interest in resolving and doing so would not "interfere with reservation self-government."[143]

B. Not Decided or Unclear: 3

1. Mississippi

The Mississippi Supreme Court decided *Harrison v. Boyd Miss., Inc.*, in 1997, and did not rule on the applicability of tribal exhaustion.[144] The court "note[d] the line of Federal cases requiring the exhaustion of tribal remedies prior to review by Federal Courts[,]" and found that "[s]ince no companion case is pending in tribal court, this doctrine is not applicable in the case *sub judice*."[145] Justice Fred L. Banks, Jr., concurred in part, which Chief Justice Dan M. Lee joined, finding that the majority did not need to resolve whether the tribal court had jurisdiction—that it was sufficient to find the state court "did have jurisdiction and that no principle of comity required that it relinquish that jurisdiction."[146] Justice James W. Smith, Jr., published a dissent urging the majority to embrace the tribal remedies doctrine.[147] In Justice Smith's view, "Under the doctrine of comity, the recognition of the judicial independence of another sovereign, courts should not exercise jurisdiction over civil cases where those cases are subject to tribal jurisdiction, until tribal remedies have been exhausted."[148]

2. New Mexico

New Mexico state courts have not made a clear decision on the doctrine one way or the other. In *Tempest Recovery Services, Inc. v. Belone*, the Supreme Court of New Mexico employed the *Williams v. Lee* infringement test and found that the state court could exercise jurisdiction when it had concurrent jurisdiction with the tribal court.[149] Within its decision, the *Tempest Recovery* court included a footnote "recogniz[ing]" that "federal courts apply an 'exhaustion doctrine,' which allows for a tribal court to

142. *Maxa*, 924 P.2d at 373.
143. *Id.* at 374.
144. Harrison v. Boyd Miss., Inc., 700 So. 2d 247, 251 n.3 (Miss. 1997).
145. *Id.*
146. *Id.* at 252 (Banks, J., concurring in part).
147. *Id.* at 254–55 (Smith, J., dissenting).
148. *Id.* at 254.
149. Tempest Recovery Servs., Inc. v. Belone, 74 P.3d 67, 69–72 (N.M. 2003).

determine its jurisdiction before a federal court will exercise its own jurisdiction in cases where concurrent jurisdiction may exist."[150] No further comment on the doctrine followed.

But six years later, New Mexico's intermediate appellate court decided *Martinez v. Cities of Gold Casino*, where the parties directly raised the issue of tribal exhaustion.[151] The *Martinez* court determined it need "not reach [the] argument concerning exhaustion of tribal remedies" because sovereign immunity was not waived.[152] Although this is not close to a ruling embracing the doctrine, it is notable that, in the context of a party urging the court to "adopt the exhaustion rule set forth in *National Farmers*[,]" the court did not cite *Tempest Recovery*, instead treating the issue as unresolved for New Mexico state courts.[153]

3. New York

A New York court addressed the tribal remedies doctrine and observed that another state court has held that it applies as substantive federal law.[154] Even if the court "assum[ed] that the rule is a substantive federal law made binding on state courts pursuant to the Supremacy Clause[,]" the court "conclude[d] that it d[id] not apply to th[e] case because there [was] no action pending in a Seneca Nation tribal court."[155]

C. Maybe Applies: 6

1. Minnesota

The intermediate appellate courts of Minnesota apply the tribal remedies doctrine.[156] In *Gavle v. Little Six, Inc.*, however, Minnesota's Supreme Court discussed the doctrine as though it was a sub-component of the

150. *Id.* at 72 n.3.

151. Martinez v. Cities of Gold Casino, 215 P.3d 44, 53 (N.M. Ct. App. 2009).

152. *Id.*

153. *Id.*

154. Seneca v. Seneca, 741 N.Y.S.2d 375, 379 (N.Y. App. Div. 2002) (citing Drumm v. Brown, 716 A.2d 50, 61–64 (Conn. 1998)).

155. *Id.*

156. *See, e.g.*, Matsch v. Prairie Island Indian Cmty., 567 N.W.2d 276, 278 (Minn. Ct. App. 1997) (requiring tribal exhaustion); Klammer v. Lower Sioux Convenience Store, 535 N.W.2d 379, 381 (Minn. Ct. App. 1995) (same); *see also* Lower Sioux Indian Cmty. v. Kraus-Anderson Const. Co., No. A09-777, 2010 WL 696392, at *4 (Minn. Ct. App. Mar. 2, 2010) (same). *Klammer* makes the important point that the doctrine applies even if the state court exercises jurisdiction based on Public Law 280, 535 N.W.2d at 383–84, because, as *Iowa Mutual* held, the doctrine has relevance "[r]egardless of the basis for jurisdiction," Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987).

broader *Williams v. Lee* infringement principle.[157] Despite finding concurrent jurisdiction between state and tribal courts, the court did not require tribal exhaustion because there was no infringement under *Williams v. Lee*.[158]

2. Idaho

The Supreme Court of Idaho observed in *Coeur d'Alene Tribe v. Johnson* that the "[U.S.] Supreme Court has never specifically held that this doctrine applies to the states, and it is unclear whether it does."[159] However, the court went on to note "[t]he reasoning in *Drumm* is persuasive as it analyzes the application of the exhaustion doctrine in a situation similar to the present case."[160] The *Johnson* court especially embraced *Drumm*'s conclusion that "the doctrine is only applicable when there is pending litigation in tribal court."[161] Because there was no pending tribal case in *Johnson*, the court concluded exhaustion was not applicable.[162]

3. Iowa

While Iowa's intermediate court of appeals did not formally adopt the tribal remedies doctrine, it may have implicitly done so when it determined that exhaustion was unnecessary because the futility exception applied.[163]

4. Nebraska

In *Thomas v. Thomas*, the Supreme Court of Nebraska refused to reach the merits because the case was moot.[164] *Thomas* noted, however, that the lower court "declined to exercise jurisdiction because appellant failed to exhaust [his] Tribal Court remedies regarding the existence and extent of the subject matter jurisdiction of the Coeur D'Alene Tribal Court and the

157. Gavle v. Little Six, Inc., 555 N.W.2d 284, 292 (Minn. 1996). *See supra* Section II.A.

158. *Gavle*, 555 N.W.2d at 292. *Drumm* cites *Gavle* as a case finding "the exhaustion doctrine is not applicable to state courts." *Drumm*, 716 A.2d at 61 n.11.

159. Coeur d'Alene Tribe v. Johnson, 405 P.3d 13, 18 (Idaho 2017) (citing *Drumm*, 716 A.2d at 61).

160. *Id.*

161. *Id.*

162. *Id.* at 19.

163. Wasker, Dorr, Wimmer & Marcouiller, P.C. v. Bear, No. 04-1917, 2006 WL 3017875, at *4 (Iowa Ct. App. Oct. 25, 2006) ("We affirm denial of the motion to dismiss for want of jurisdiction based upon the futility of attempting to try an issue in a nonexistent tribal court.").

164. Thomas v. Thomas, 453 N.W.2d 752, 754 (1990).

District Court of Knox County, Nebraska relied upon the authority of *National Farmers*."[165] Although the appellant challenged this determination, the *Thomas* court made no comment on it, found the case moot, and affirmed the lower court.[166]

5. South Dakota

The Supreme Court of South Dakota quoted *National Farmers* in addressing "the question of whether [it] has jurisdiction to review the validity of tribal court proceedings[,]" and the court "acknowledge[d] that the 'forum whose jurisdiction is being challenged [should have] the first opportunity to evaluate the factual and legal basis for the challenge.'"[167] The citation to *National Farmers* was followed with a parenthetical, which noted that in that case the U.S. Supreme Court "declin[ed] to consider relief until tribal court remedies are exhausted."[168] The court did not definitively embrace the doctrine.

In *Calvello v. Yankton Sioux Tribe*, the Supreme Court of South Dakota held in part that, if the appellant had a legitimate suit against the tribe, he had to seek it in tribal court.[169] The court supported this determination by stating that "[i]n matters involving commercial relations, it has long been acknowledged that 'subject[ing] a dispute arising on a reservation . . . to a forum other than the one they have established for themselves,' may 'undermine the authority of the tribal cour[t] . . . and hence . . . infringe on the right of the Indians to govern themselves.'"[170] This statement relied on a string citation, which included *National Farmers* and two federal district court cases with explanatory parentheticals suggesting the tribal remedies doctrine applies to state courts.[171]

---

165. *Id.* (alteration in original) (citing Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985)).

166. *Id.*

167. *In re* Estate of Colombe, 885 N.W.2d 350, 357 (S.D. 2016) (alteration in original) (quoting *Nat'l Farmers Union*, 471 U.S. at 856).

168. *Id.*

169. 1998 S.D. 107, ¶ 22, 584 N.W.2d 108, 116.

170. *Id.* (alterations in original) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978)).

171. *Id.* (citing Bowen v. Doyle, 880 F. Supp. 99, 123 (W.D.N.Y. 1995) (even if state court has jurisdiction and matter is not currently pending before tribal court, state courts must abstain from hearing suits arising on reservations until after tribal courts have resolved the issue); Smith v. Babbitt, 875 F. Supp. 1353, 1366–67 (D. Minn. 1995) (non-tribal court must abstain from hearing matter arising on Indian land until plaintiff has exhausted remedies in tribal court)). The parentheticals are presented as they appear verbatim in

6. Wisconsin

In *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, the Supreme Court of Wisconsin recognized that both the state and tribe had legitimate claims to jurisdiction, so it "conclude[d] that principles of comity in this situation required the circuit and tribal courts to confer for purposes of jurisdiction allocation prior to proceeding to judgment."[172] The court "remand[ed] to the circuit court to convene such a conference, at which the respective courts will weigh considerations of comity and tribal exhaustion to determine whether the judgments should be reopened for purposes of jurisdiction allocation and retrial."[173] *Teague* does not concretely hold that the doctrine applies in Wisconsin state court, but there is the suggestion, and at least one commentator noticed.[174]

D. Does Apply: 5

1. Connecticut

One of the leading state court cases adopting the tribal exhaustion doctrine is the Connecticut Supreme Court's 1998 decision in *Drumm v. Brown*.[175] In evaluating *National Farmers*, *Iowa Mutual*, and other relevant cases, the *Drumm* court found "strong suggestions" that the doctrine constitutes substantive federal law "binding in state courts pursuant to the supremacy clause of the federal constitution."[176] Putting that question aside,

---

Calvello. However, a recent case that did not discuss the tribal remedies doctrine could cast doubt on whether the doctrine applies in South Dakota. *See also* Stathis v. Marty Indian Sch., 2019 S.D. 33, 930 N.W.2d 653 (finding federal law preempted state jurisdiction, without deciding whether *Williams v. Lee* barred suit of former high school principal against Marty Indian School; no discussion of tribal courts or exhaustion).

172. 2000 WI 79, ¶ 41, 612 N.W.2d 709, 720.

173. *Id.* at 720–21; Carol Tebben, *Trifederalism in the Aftermath of* Teague*: The Interaction of State and Tribal Courts in Wisconsin*, 26 AM. INDIAN L. REV. 177, 181 (2001-2002) ("The case was remanded to the state trial court judge with instructions to hold a conference with the tribal judge to determine, under principles of comity and tribal exhaustion, which court should appropriately maintain jurisdiction of the litigation."). A subsequent decision from the Supreme Court of Wisconsin regarding this case referred to the conference as "the comity conference." Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians, 2003 WI 118, ¶ 5, 665 N.W.2d 899, 903.

174. Bryan Cahill, Note, *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians: Bringing the Federal Exhaustion Rule of Tribal Remedies Home to Wisconsin Courts*, 2004 WIS. L. REV. 1291, 1324–25 ("By remanding, the court subtly suggested the desired outcome—tribal remedies should have been exhausted.").

175. 716 A.2d 50, 54–55 (Conn. 1998)).

176. *Id.* at 62–63.

Drumm held that deference to "the federal policy of supporting tribal self-government . . . counsels that [the court] also adopt the doctrine for the courts of [Connecticut]."[177] In addition, the *Drumm* court analyzed whether a pending tribal court case is required before nontribal courts order exhaustion, finding "that exhaustion is not required in the absence of a pending action in the tribal court."[178]

2. North Dakota

Without providing thorough analysis like *Drumm*, the Supreme Court of North Dakota required exhaustion of tribal remedies in *Fredericks*.[179]

3. California

In an unpublished decision, a California intermediate appellate court determined that the doctrine was applicable, simply stating it "applies in state court as well as federal court."[180]

4. Alaska

Within the specific context of an Indian Child Welfare Act child custody proceeding, the Supreme Court of Alaska held that it adopts the doctrine and "will not allow a party to challenge a tribal court's judgment in an ICWA-defined child custody proceeding in Alaska state court without first exhausting available tribal court appellate remedies."[181]

177. *Id.* at 63.

178. *Id.* at 64.

179. Fredericks v. Eide-Kirschmann Ford, Mercury, Lincoln, Inc., 462 N.W.2d 164, 169 (N.D. 1990); *see also* State *ex rel.* Olson v. Harrison, 2001 ND 99, ¶ 18, 627 N.W.2d 153, 158 ("In *Fredericks,* 462 N.W.2d at 168, we held Eide should have exhausted its tribal court remedies . . . .") (citing Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987); Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985)).

180. Rivera v. Hopland Band of Pomo Indians Econ. Dev. Corp., No. A114858, 2007 WL 2310773, at *4 (Cal. Ct. App. Aug. 14, 2007) ("The doctrine applies even when a tribal agency other than a tribal court arguably has jurisdiction . . . and applies in state court as well as federal court . . . .") (citation omitted). However, in a published decision from California's intermediate court, the court declined to decide whether the doctrine applies and further found "exhaustion of tribal court remedies is not required when no tribal court *existed* at the time the action was commenced." Findleton v. Coyote Valley Band of Pomo Indians, 238 Cal. Rptr. 3d 346, 354 (Cal. Ct. App. 2018), *as modified* (Sept. 26, 2018).

181. Simmonds v. Parks, 329 P.3d 995, 1007–08 (Alaska 2014).

5. Utah

The Supreme Court of Utah's decision in *Harvey* provides the most recent comprehensive decision regarding the doctrine.[182] Because that decision is a focal point of this Article, it is discussed below in detail.

a) Harvey v. Ute Tribe

(1) Utah Supreme Court decision

The genesis of the *Harvey* case involves the oil and gas industry in the Uintah Basin and the industry's reliance on land within the Uintah and Ouray Reservation of the Ute Indian Tribe.[183] Ryan Harvey owns businesses supplying "dirt, sand, and gravel" and leasing equipment to oil and gas companies.[184] Harvey's businesses are not on tribal land, but "the items they sell and lease are often used on tribal land by the leasing or buying companies."[185] Although Harvey's "businesses did not operate directly on tribal land," a Commissioner with the Ute Tribal Employment Rights Office (UTERO) required him to obtain a Ute Business License over his objection.[186] The Commissioner then claimed Harvey obtained a forged license, but the two met and the Commissioner let go of that belief.[187] Harvey and the Commissioner had another interaction later where Harvey understood the Commissioner to be asking for a bribe, which he did not pay.[188] Eventually, Harvey received a letter from UTERO revoking his reservation access permit and alleging his businesses were operating in violation of a UTERO ordinance.[189] UTERO also distributed a letter to oil and gas companies indicating Harvey's businesses lacked access permits and warning that penalties would be imposed if other companies used Harvey's businesses.[190] Many stopped working with Harvey, so he sued in Utah state court.[191]

182. Harvey v. Ute Indian Tribe of Uintah & Ouray Reservation, 2017 UT 75, 416 P.3d 401; *see id.* ¶¶ 91–108 (Himonas, J., concurring).
183. *Id.* ¶ 1 (majority opinion).
184. *Id.* ¶ 5.
185. *Id.*
186. *Id.* ¶ 6.
187. *Id.* ¶ 7.
188. *Id.* ¶ 8.
189. *Id.* ¶ 9.
190. *Id.* ¶ 10.
191. *Id.* ¶¶ 11–12.

The lawsuit took aim at the Ute Tribe and tribal officials, claiming they exceeded their jurisdiction and committed various torts.[192] The defendants filed motions to dismiss, including a motion arguing Harvey failed to exhaust tribal remedies.[193] While the Utah trial court did not issue a direct ruling on tribal exhaustion, the Utah Supreme Court found it "essentially did so in substance" by stating that "Harvey's claim that the tribal officials exceeded the jurisdiction of the tribe or acted outside the scope of their authority under tribal law must be addressed in the tribal court."[194] The Utah Supreme Court took up that issue on appeal.

As a legal opinion, *Harvey* has a "somewhat unique character."[195] All sitting members of the court concurred in the majority opinion, except two justices dissented from the ruling on the tribal remedies doctrine.[196] That ruling in the majority opinion had the support of the two members joining the entirety of the opinion of the court, as well as a concurrence from Justice Constandinos Himonas, who "concur[red] in all of the analysis in the majority opinion and [wrote] separately to further explain his reasons for joining."[197] Additionally, "[t]he majority opinion incorporate[d] Justice Himonas's concurring opinion."[198]

On the issue of exhausting tribal remedies, the majority opinion began by identifying the challenged actions of the Ute Tribe as central to its right to self-govern because "the actions Harvey complain[ed] of relate to the ability of the Ute Tribe to exclude non-Indians from their reservation."[199] The majority isolated the three principles underlying the doctrine, finding all three support applying the doctrine.[200] First, requiring exhaustion promotes tribal self-government—"as a matter of comity, the tribe should be given the first right to interpret the . . . letter [to oil and gas companies] and determine the tribe's jurisdiction" in that exercise of power.[201] Second, exhaustion is efficient because it allows the tribal court "to interpret the tribe's order and vet the factual challenge to the tribe's jurisdiction as a

192. *Id.* ¶ 12.
193. *Id.*
194. *Id.* ¶ 13.
195. *Id.* ¶ 3.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* ¶ 43.
200. *Id.* ¶ 49 (analogizing the case to Burlington N. R.R. v. Crow Tribal Council, 940 F.2d 1239, 1246 (9th Cir. 1991)).
201. *Id.*

matter of judicial economy."[202] And third, "forcing Harvey to litigate in tribal court provides clarity to the parties and any reviewing court on how the tribe views its own jurisdiction."[203] The majority would require exhaustion despite the absence of a case pending in tribal court.[204]

Justice Himonas's concurrence, which is an arm of the majority opinion, expounded on the antecedent issue of whether to apply the tribal remedies doctrine in the first place. According to Justice Himonas, the "express language" of *Iowa Mutual* makes the doctrine applicable;[205] specifically, *Iowa Mutual*'s statement that exhaustion is necessary for "any nontribal court."[206] Justice Himonas explained that requiring exhaustion accords with the policy of limiting state control over tribes.[207] Otherwise, state courts would be "in a superior position to federal courts in hearing cases that implicate tribal jurisdiction[,]" which would "give rise to a scheme where plaintiffs overwhelmingly chose to litigate in state court instead of tribal court—a state of affairs that would wholly subvert the federal policy of encouraging the development of tribal court systems."[208] Noting that a state court's "control over litigation that could also proceed in tribal court . . . has the exact same effect on tribal self-determination as when a federal court assumes such control[,]" Justice Himonas concluded, "[T]he tribal exhaustion rule admits of no distinction between federal and state courts . . . ."[209]

In contrast to the dissenting opinion, the concurrence stated that analogizing the tribal remedies doctrine to exhaustion of administrative remedies is inaccurate and fails to appreciate "tribes' unique status and history—a status and history that should inform how we construe legal terms imported from other areas of law into the Indian law context."[210] The concurrence also found tribal exhaustion is not akin to abstention because that involves a court "balanc[ing] multiple factors, including judicial economy concerns and the avoidance of piecemeal litigation."[211] Instead of "a multifactorial, abstention-style balancing test to determine when

202. *Id.* ¶ 50.
203. *Id.*
204. *Id.* ¶ 51.
205. *Id.* ¶ 95 (Himonas, J., concurring).
206. *Id.* ¶ 93 (citing Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987); Nevada v. Hicks, 533 U.S. 353, 398 (2001) (O'Connor, J., concurring)).
207. *Id.* ¶ 96 (Himonas, J., concurring).
208. *Id.* ¶ 97.
209. *Id.* ¶ 98.
210. *Id.* ¶ 103.
211. *Id.* ¶ 106.

exhaustion is appropriate[,]" the tribal remedies doctrine mandates exhaustion of tribal remedies.[212]

Associate Chief Justice Thomas R. Lee, joined by Chief Justice Matthew B. Durrant, issued an opinion dissenting from the majority's tribal exhaustion analysis. On tribal exhaustion, the dissent emphasized that the U.S. Supreme Court "has never considered the important question presented here."[213] Without "a controlling statute or binding precedent from the U.S. Supreme Court," the dissent took "to decid[ing] how to balance the needed deference to the sovereignty and jurisdiction of the tribal courts."[214]

The dissent determined that the doctrine established in *National Farmers* and *Iowa Mutual* is "a matter of federal Indian law" that does not apply to state courts.[215] Drawing on Utah "common law authority[,]" the dissent would "conclude that [Utah] courts should stay [their] exercise of jurisdiction only *after* one of the parties has invoked the jurisdiction of the tribal courts."[216] In the dissent's view, the language Justice Himonas relied on in *Iowa Mutual* is dicta that does not "extend to a case like" *Harvey*.[217] The dissent likened the tribal remedies doctrine to administrative exhaustion; it stated that because exhaustion "is a principle that regulates the timing of proceedings in tribunals that operate in a hierarchical relationship," it should not bind state courts because that structure does not exist between state and tribal courts.[218] Even if the holdings of *National Farmers* and *Iowa Mutual* apply to state courts, the dissent "would not interpret those cases to require exhaustion in the absence of a pending case filed in tribal courts."[219]

According to the dissent, the three reasons *National Farmers* articulated as undergirding tribal exhaustion also support demanding a pending tribal case.[220] For instance, *National Farmers* was concerned with "the need to allow the 'forum whose jurisdiction is being challenged'" to assess its own authority, but that concern does not manifest until a tribal case gets filed.[221] Within this discussion, the dissent compared the doctrine to abstention

212. *Id.* ¶ 107.
213. *Id.* ¶ 124 (Lee, A.C.J., concurring in part and dissenting in part).
214. *Id.* ¶ 128.
215. *Id.* ¶ 117.
216. *Id.* ¶ 118.
217. *Id.* ¶ 121.
218. *Id.*
219. *Id.* ¶ 130.
220. *Id.* ¶¶ 132–141.
221. *Id.* ¶ 138 (quoting Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985)).

because they "are closely related doctrines" that are "based on concerns regarding comity and deference to ongoing judicial proceedings."[222] The dissent asserted that forcing the defendants "to file a declaratory suit in tribal court[,]" which they so far "declined to file[,]" would "overrid[e]" their "right of self-governance."[223]

(2) U.S. Supreme Court Petition for Certiorari

Harvey sought review of the Utah Supreme Court's decision by filing a petition for writ of certiorari with the U.S. Supreme Court. The petition presented two questions:

> 1. Whether the tribal remedies exhaustion doctrine, which requires federal courts to stay cases challenging tribal jurisdiction until the parties have exhausted parallel tribal court proceedings, applies to state courts as well.
>
> 2. Whether the tribal remedies exhaustion doctrine requires that nontribal courts yield to tribal courts when the parties have not invoked the tribal court's jurisdiction.[224]

The petition claimed the Utah Supreme Court answered both questions incorrectly, placing it in tension with various state and federal courts.[225] Much of the petition's argument relied on Associate Chief Justice Lee's dissent.[226] In support of Harvey's petition, the State of Utah filed a brief as amicus curiae.[227] Utah focused on state sovereignty and argued that the *Harvey* decision diminishes Utah's sovereignty.[228]

Before ruling on the petition, the Supreme Court issued an order inviting a brief from the Office of the Solicitor General to set out the views of the United States.[229] The Solicitor General argued for denial of the petition.[230]

---

222. *Id.* ¶ 135.

223. *Id.* ¶ 142.

224. Petition for a Writ of Certiorari, Harvey v. UTE Indian Tribe of the Uintah & Ouray Reservation, 139 S. Ct. 784 (2018) (No. 17-1301), 2018 WL 1327120, at *i.

225. *Id.* at *16–33.

226. *Id.*

227. Brief of the State of Utah as Amicus Curiae Supporting Petitioners, Harvey v. UTE Indian Tribe of the Uintah & Ouray Reservation, 139 S. Ct. 784 (2018) (No. 17-1301), 2018 WL 1850971.

228. *Id.* at *8–9.

229. Brief for the United States as Amicus Curiae, Harvey v. UTE Indian Tribe of the Uintah & Ouray Reservation, 139 S. Ct. 784 (2019) (No. 17-1301), 2018 WL 6382963, at *1.

230. *Id.*

On the first question presented, the government noted that *Iowa Mutual*'s treatment of tribal exhaustion reveals that it "applies as a matter of 'federal policy' when necessary to prevent 'direct competition with the tribal courts' by 'any nontribal court'—which would appear to include a state court—on matters of tribal 'authority over reservation affairs.'"[231] Despite state courts resolving questions relating to tribal exhaustion differently, the government asserted that, rather than squarely ruling on the issue like the Utah Supreme Court, other relevant state court decisions "relied on multiple considerations—often drawing simultaneously on related Indian-law doctrines, such as the *Williams v. Lee* infringement test . . . in deciding whether to stay state-court proceedings in favor of proceedings in tribal court."[232] The government understood "[t]he differing outcomes in those cases [as] more properly attributed to the courts' consideration of case-specific factors."[233]

Turning to the second question presented, the government contended "the justification for abstaining in favor of tribal-court proceedings under the specific rationales of *National Farmers* and [*Iowa Mutual*] would appear ordinarily to depend on whether tribal-court proceeding are, in fact, pending."[234] The government argued that without a pending "tribal-court proceeding[,] . . . adjudication of the parties' claims by a non-tribal court would not create any 'direct competition' with tribal courts."[235] And "where a non-Indian attempts to sue a tribe or tribal member in state court concerning on-reservation conduct (whether or not there is a pending tribal-court proceeding), any bar to the state court's adjudication of the case would normally be based . . . on *Williams v. Lee*," and its ruling "that suits against tribal members in state court involving on-reservation conduct are generally barred."[236]

The government also pointed out that the "Court has concluded that state courts may resolve disputes involving tribes and tribal members concerning access to a reservation, where the cause of action arose outside of Indian country."[237] The Court additionally "approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those

231. *Id.* at *12 (quoting Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987)).
232. *Id.* at *18.
233. *Id.*
234. *Id.* at *12.
235. *Id.* (quoting *Iowa Mut.*, 480 U.S. at 16).
236. *Id.* at *12–13 (citation omitted).
237. *Id.* at *13.

claims arose in Indian country."[238] Moreover, the government argued, a state court is free to decide "suits that implicate tribal interests[,]" and, "if necessary to resolve state-law claims[,]" it may interpret tribal law as it would proceed "interpreting federal law or the law of another State."[239]

The government also stated in its amicus brief that the *Harvey* case is not a good candidate for resolving the questions presented.[240] In discussing what claims Harvey's tribal case may need to include, the government highlighted that no one argued against a state court "retaining jurisdiction over claims over which it would otherwise have jurisdiction under *Williams v. Lee*," while calling "for a tribal court to decide specific questions within its expertise—in a manner analogous to principles of primary jurisdiction or certification of state-law issues to a state court.[241] The government stated it was "aware of no basis in federal law for disapproving that procedure."[242]

After receiving the U.S. Solicitor General's brief, the U.S. Supreme Court denied the petition for writ of certiorari.[243] As is customary, the Court provided no explanation.[244]

The remainder of this Article weighs the history and law set forth above, and it establishes a new approach to interpreting and implementing the tribal remedies doctrine, with a focus on state courts.

IV. Contrast with Administrative Exhaustion and Abstention

Courts often analyze the extent to which the tribal remedies doctrine shares characteristics of other doctrines—specifically, exhaustion of administrative remedies and abstention under *Colorado River* or *Younger*. In each of these contexts, a court stays its hand or dismisses a case based on the existence (or non-existence) of proceedings in a different forum.

Administrative exhaustion relates to the requirement that a claim run its course through an agency prior to forming the basis for a lawsuit. For example, if the U.S. Forest Service is negligent in carrying out controlled burns and damages a farmer's land, and the farmer wants to file a Federal Tort Claims Act case, the farmer must first pursue the matter before the

238. *Id.* (citing Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C., 467 U.S. 138, 148 (1984)).

239. *Id.*

240. *Id.* at *20.

241. *Id.* at *21.

242. *Id.*

243. Harvey v. UTE Indian Tribe of the Uintah & Ouray Reservation, 139 S. Ct. 784 (2019).

244. *Id.*

applicable federal agency. Two main purposes underpin administrative exhaustion. First, it protects "administrative agency authority" by discouraging "disregard of the agency's procedures" and providing the agency "an opportunity to correct its own mistakes" before a court gets involved.[245] And second, it supports efficiency and the economical resolution of claims involving agencies and may "produce a useful record for subsequent judicial consideration."[246]

Colorado River abstention is a rule where "federal courts may decline to exercise their jurisdiction, in otherwise 'exceptional circumstances,' where denying a federal forum would clearly serve an important countervailing interest, for example, where abstention is warranted by considerations of 'proper constitutional adjudication,' 'regard for federal-state relations,' or 'wise judicial administration.'"[247] And *Younger* abstention "exemplifies one class of cases in which federal-court abstention is required: When there is a parallel, pending state criminal proceeding, federal courts must refrain from enjoining the state prosecution."[248] "[P]articular state civil proceedings that are akin to criminal prosecutions" also implicate *Younger*, as do proceedings involving "a State's interest in enforcing the orders and judgments of its courts."[249]

Some jurists find an apt comparison between the tribal remedies doctrine and administrative exhaustion.[250] This tends to be a position held by those claiming the doctrine does not apply to state courts. Courts that conclude the tribal remedies doctrine is mandatory for state courts often distinguish it from administrative exhaustion,[251] and some point out similarities with

245. Woodford v. Ngo, 548 U.S. 81, 89 (2006) (internal quotations marks and alterations omitted).

246. *Id.* (internal quotations marks and alterations omitted).

247. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996) (citations omitted). It usually applies when there is: "[1)] a pending state proceeding; 2) a federal case involving the same or functionally similar claims and parties; 3) no constitutional or federalism problems are presented; and, 4) abstention is ordered out of considerations of wise judicial administration." Comm. on Fed. Courts of the N.Y. State Bar Ass'n, *The Abstention Doctrine: The Consequences of Federal Court Deference to State Court Proceedings*, 122 F.R.D. 89, 98 (1988).

248. Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 72 (2013).

249. *Id.* at 72–73.

250. *See* Harvey v. Ute Indian Tribe of Uintah & Ouray Reservation, 2017 UT 75, ¶ 120, 416 P.3d 401 (Lee, A.C.J., concurring in part and dissenting in part); Astorga v. Wing, 118 P.3d 1103, 1106–08 (Ariz. Ct. App. 2005).

251. *Harvey*, 2017 UT 75, ¶ 104 (Himonas, J., concurring); Drumm v. Brown, 716 A.2d 50, 60 (Conn. 1998).

abstention rules.[252] State court applicability aside, other jurists distinguish abstention from the doctrine.[253]

Rather than fitting the tribal remedies doctrine into pre-existing categories like administrative exhaustion and abstention, it is best to view the doctrine as something independent, though it exhibits certain characteristics of established legal rules. Based on review of the discussions in cases on this subject, there are least three common issues built into these legal doctrines: (1) whether it is jurisdictional or prudential; (2) whether it can be waived; and (3) whether it involves balancing different factors.[254]

A. Jurisdictional or Prudential

The tribal remedies doctrine, *Colorado River* abstention, and *Younger* abstention are prudential rules rooted in comity, not the court's jurisdiction.[255] Administrative exhaustion, however, is sometimes prudential and at other times jurisdictional. For example, the statutorily mandated exhaustion of administrative remedies in the Freedom of Information Act is prudential;[256] whereas the Federal Tort Claims Act's requirement of exhaustion with the applicable agency is tied to the court's

252. *Drumm*, 716 A.2d at 677 n.8; *Harvey*, 2017 UT 75, ¶ 135 (Lee, A.C.J., concurring in part and dissenting in part). Dicta in *Iowa Mutual* makes the comparison to abstention. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 n.8 (1987). Scholars picked up on this. Kirsten Matoy Carlson, Note, *Towards Tribal Sovereignty and Judicial Efficiency: Ordering the Defenses of Tribal Sovereign Immunity and Exhaustion of Tribal Remedies*, 101 MICH. L. REV. 569, 576 n.44 (2002); Watson, *supra* note 31, at 534–35; Timothy W. Joranko, *Exhaustion of Tribal Remedies in the Lower Courts After* National Farmers Union *and* Iowa Mutual*: Toward a Consistent Treatment of Tribal Courts by the Federal Judicial System*, 78 MINN. L. REV. 259, 277 (1993).

253. *Harvey*, 2017 UT 75, ¶ 106 (Himonas, J., concurring).

254. In the context of an article encouraging federal courts to reassess their implementation of the tribal remedies doctrine, Professor Watson provides a thorough discussion of the doctrine alongside administrative exhaustion and abstention. Watson, *supra* note 31, at 588–609.

255. *Iowa Mut.*, 480 U.S. at 15, 20 n.14 (tribal remedies doctrine); Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77 (2013) (*Younger*); Allian v. Allian, No. 18 C 3825, 2018 WL 6591422, at *4 (N.D. Ill. Dec. 14, 2018) (*Colorado River*).

256. Jean-Pierre v. Fed. Bureau of Prisons, 880 F. Supp. 2d 95, 104 n.8 (D.D.C. 2012); Hull v. IRS, 656 F.3d 1174, 1181–82 (10th Cir. 2011) (collecting cases). The Supreme Court recently held that a specific aspect of the administrative exhaustion framework within Title VII of the Civil Rights Act of 1964 is prudential and not jurisdictional. Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1846–47 (2019) ("We hold that Title VII's charge-filing instruction is not jurisdictional, a term generally reserved to describe the classes of cases a court may entertain (subject-matter jurisdiction) . . . .").

jurisdiction.[257] With the former, failure to exhaust does not force the court to dismiss for lack of jurisdiction—but with the latter, it does.

Courts generally employ abstention in "exceptional" circumstances[258] and describe it as "the exception, not the rule."[259] This is because the baseline against abstention is "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."[260] Tribal exhaustion, however, is the default when the tribal court has a legitimate claim to jurisdiction, and the nontribal court retains jurisdiction only if the case meets an exception established by the Supreme Court.[261]

The comity concerns of *Colorado River* and *Younger* relate to state courts. But the tribal remedies doctrine emphasizes comity toward tribal courts. Between federal and state courts on one hand, and between nontribal and tribal courts on the other, comity has significantly different meanings. In the context of a tribe's unique sovereign status in the country's history, comity is directed at supporting tribal self-government.[262] *Younger*'s respect for state courts comes from an entirely distinct rationale—the "recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."[263] The driver for comity in *Colorado River* is "considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."[264] These are different flavors of cross-jurisdictional respect.

Further, *Colorado River* and *Younger* come into play in cases where the court already has jurisdiction.[265] Courts are divided about whether the same

257. Coleman v. United States, 912 F.3d 824, 834 (5th Cir. 2019).

258. *Jacobs*, 571 U.S. at 73 ("Circumstances fitting within the *Younger* doctrine, we have stressed, are 'exceptional' . . . .").

259. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976) ("Abstention from the exercise of federal jurisdiction is the exception, not the rule.").

260. *Id.* at 817.

261. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 n.21 (1985); *see* Nevada v. Hicks, 533 U.S. 353, 369 (2001).

262. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987); *see also* El Paso Nat. Gas Co. v. Neztsosie, 526 U.S. 473, 484 (1999) ("Exhaustion was appropriate in [*National Farmers* and *Iowa Mutual*] because 'Congress is committed to a policy of supporting tribal self-government.'") (quoting *National Farmers*, 471 U.S. at 856).

263. Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431 (1982) (internal quotation marks omitted).

264. *Colorado River*, 424 U.S. at 817 (internal alteration and quotation marks omitted).

265. Brooks v. N.H. Supreme Court, 80 F.3d 633, 638 (1st Cir. 1996) (describing *Younger* as "paradigm" where "a federal court must abstain from reaching the merits of a

is true for the tribal remedies doctrine; some find jurisdiction must come first,[266] and others conclude that the doctrine may precede a jurisdictional inquiry.[267]

B. Waiver

The function of waiver is another difference between the legal rules. A party generally may not waive its ability to invoke the tribal remedies doctrine,[268] and a court can invoke the doctrine sua sponte.[269] For administrative exhaustion grounded in jurisdiction, waiver is not available, as a party may raise the issue at any point in a motion to dismiss for lack of subject matter jurisdiction.[270] But prudential administrative exhaustion is a defense that may be waived, and courts usually address the issue in the

---

case over which it has jurisdiction"); Thomas-Wise v. Nat'l City Mortg. Co., No. 14 C 3460, 2015 WL 641770, at *2 (N.D. Ill. Feb. 13, 2015) ("*Colorado River* abstention comes into play only after a federal court has otherwise assured itself of its subject matter jurisdiction.").

266. Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 28–29 (1st Cir. 2000) ("[A]s long as federal subject-matter jurisdiction exists, a defense predicated on tribal sovereign immunity is susceptible to direct adjudication in the federal courts, without reference to the tribal exhaustion doctrine.") (citing cases from the Fifth and Seventh Circuits).

267. Garcia v. Akwesasne Hous. Auth., 268 F.3d 76, 79 (2d Cir. 2001) ("We consider tribal exhaustion first; sovereign immunity second."); Davis v. Mille Lacs Band of Chippewa Indians, 193 F.3d 990, 992 (8th Cir. 1999); Romero v. Wounded Knee, LLC, No. CIV. 16-5024-JLV, 2018 WL 4279446, at *2 (D.S.D. Aug. 31, 2018) ("Tribal sovereign immunity goes to the court's subject matter jurisdiction and usually the court must address jurisdictional issues first. But the precedent of the United States Court of Appeals for the Eighth Circuit requires the court to enforce the exhaustion of tribal court remedies before fully analyzing tribal sovereign immunity."). The *Romero* court found that, even in the face of Title VII claims subject to exclusive federal jurisdiction, the tribal court should still have the opportunity to assess a tribal sovereign immunity defense; if the defendant was immune, then it would not matter whether the tribal court could exercise authority over the Title VII claims. *Romero*, 2018 WL 4279446, at *2–4.

268. Smith v. Moffett, 947 F.2d 442, 445 (10th Cir. 1991). *But see* World Fuel Servs., Inc. v. Nambe Pueblo Dev. Corp., 362 F. Supp. 3d 1021, 1090 n.28 (D.N.M. Jan. 23, 2019) (discussing that waiver may be possible); *see also Ninigret*, 207 F.3d at 31 n.7 ("There is virtually no case law as to the effectiveness *vel non* of an express disclaimer of tribal court remedies.").

269. United States v. Tsosie, 92 F.3d 1037, 1041 (10th Cir. 1996); *Romero*, 2018 WL 4279446, at *2.

270. Coleman v. United States, 912 F.3d 824, 835 (5th Cir. 2019) (affirming district court's "holding [that] exhaustion [is] a jurisdictional prerequisite for FTCA claims that cannot be waived.") (citing McNeil v. United States, 508 U.S. 106, 109–13 (1993)).

context of a motion to dismiss for failure to state a claim.[271] Both forms of abstention are waivable and may be raised sua sponte.[272]

C. Balancing

Turning to whether or not a court balances factors in applying each legal rule, the tribal remedies doctrine does not involve a balancing inquiry—generally, if the tribal court has a colorable claim to jurisdiction, tribal court proceedings must occur.[273] Similarly, administrative exhaustion incorporates no balancing judgments; administrative remedies were exhausted or they were not, and before moving forward the court either requires exhaustion (if jurisdictional) or considers whether the issue is properly before the court (if prudential). Abstention under *Colorado River* asks the court to weigh various factors in examining the need to stay its hand or dismiss the case.[274] However, some courts find that "*balancing* the *Younger* elements, rather than determining whether each element, on its own, is satisfied, conflicts with the requirement that federal courts abstain only in those cases falling within the 'carefully defined' boundaries of federal abstention doctrines."[275] Whether an exception to the tribal remedies doctrine is met draws upon the court's legal judgment in a more discretionary manner, but there still is not a multi-factorial balancing inquiry similar to abstention rules.[276]

D. Hierarchy

There is another distinction between the tribal remedies doctrine and administrative exhaustion worth noting. Some who find that the tribal

271. *See* Acosta v. FBI, 946 F. Supp. 2d 47, 49–52 (D.D.C. Apr. 17, 2013) (analyzing FOIA exhaustion under FED. R. CIV. P. 12(b)(6) and noting an agency's "lapse waives any requirement Plaintiff had to exhaust his administrative appeals").

272. Lamex Foods, Inc. v. Audeliz Lebrón Corp., 646 F.3d 100, 112 n.15 (1st Cir. 2011) (holding *Colorado River* may be waived and also the court can raise it sua sponte); Bice v. La. Pub. Def. Bd., 677 F.3d 712, 716 n.3 (5th Cir. 2012) (finding *Younger* may be waived); Hill v. Snyder, 878 F.3d 193, 206 (6th Cir. 2017) (noting court can raise *Younger* sua sponte).

273. *See* Harvey v. Ute Indian Tribe of Uintah & Ouray Reservation, 2017 UT 75, ¶ 107, 416 P.3d 401 (Himonas, J., concurring).

274. Black Sea Inv., Ltd. v. United Heritage Corp., 204 F.3d 647, 650 (5th Cir. 2000) (balancing the *Colorado River* factors); *see also Harvey*, 2017 UT 75, ¶ 106 (Himonas, J., concurring) (describing *Colorado River* as "balanc[ing] multiple factors, including judicial economy concerns and the avoidance of piecemeal litigation").

275. AmerisourceBergen Corp. v. Roden, 495 F.3d 1143, 1148 (9th Cir. 2007) (quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359 (1989)).

276. *Harvey*, 2017 UT 75, ¶ 107 (Himonas, J., concurring).

remedies doctrine should not apply in state courts make a certain point about the hierarchical structure of an exhaustion requirement. The latest iteration of this argument is in Associate Chief Justice Lee's opinion in *Harvey*.[277] According to this view, exhaustion "is a principle that regulates the timing of proceedings in tribunals that operate in a hierarchical relationship."[278] Because federal courts and not state courts have the power to review tribal court rulings after the tribal remedies doctrine is enforced, *National Farmers* and *Iowa Mutual* are "not implicated" in state court.[279] This is due to the lack of a "hierarchical relationship between the two sovereign courts—and thus no right of direct review."[280]

This line of reasoning glosses over important differences between administrative agencies and tribal nations. As Justice Himonas explained in *Harvey*, the argument fails to appreciate that, "[u]nlike administrative agencies, or even states, tribes are not subordinates in our constitutional hierarchy."[281] Tribes "remain separate sovereigns pre-existing the Constitution," subject to Congress' "plenary control."[282] The timing of the existence of tribal nations illustrates a distinction between their authority and that of administrative agencies.[283] A federal agency where claims must be exhausted came into existence after the creation of the federal government. And some agencies, like the Equal Employment Opportunity Commission (EEOC), were created long after the establishment of the federal government.[284] If the federal government went away, so would the federal agencies. Native nations on the other hand, were active long before the United States.[285] Their existence, while under the control of Congress

277. *Id.* ¶ 121 (Lee, A.C.J., concurring in part and dissenting in part); *see also* Astorga v. Wing, 118 P.3d 1103, 1106–08 (Ariz. Ct. App. 2005).

278. *Id.* (Lee, A.C.J., concurring in part and dissenting in part) (citation and quotation marks omitted).

279. *Id.* ¶ 123.

280. *Id.* (citing *Astorga*, 118 P.3d at 1107).

281. *Id.* ¶ 104 (Himonas, J., concurring).

282. *Id.* (Himonas, J., concurring) (internal quotation marks omitted) (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788–89 (2014)).

283. This distinction in ontology is key to keeping the two separate. *See generally* Thomas Hofweber, *Logic and Ontology: 3.1. Different Conceptions of Ontology*, STAN. ENCYCLOPEDIA OF PHIL. (Oct. 11, 2017), https://plato.stanford.edu/entries/logic-ontology/#Ont (exploring different ideas of ontology).

284. Congress created the EEOC as part of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-4 (2018).

285. Cooter & Fikentscher, *supra* note 2, at 298–302.

within the framework of federal Indian law, is independent from the federal and state governments of the United States.

Furthermore, the exertion of authority over people is different between agencies and tribes. Agencies have power over people as arms of the federal government, which exerts sovereign power over American citizens that they granted to the government.[286] This applies equally to non-Indian and Indian people.[287] The power of tribal judiciaries, functioning as branches of tribal governments, is not drawn from all Americans[288] and affects non-Indian and Indian people differently. The jurisdictional reach of tribal courts is much more limited than federal agencies. Tribal courts have jurisdiction over non-Indian people in specifically designated instances only.[289] And their criminal jurisdiction is even more circumscribed.[290] At the same time, "tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."[291]

The bottom line is that federal administrative agencies and tribal governments are not amenable to analogy. Consequently, it is a weakness for an argument—based on that analogy—to claim that the tribal remedies doctrine does not apply to state courts. The comparison might be helpful for giving general context to the tribal remedies doctrine, but not for resolving complicated and substantive questions about it.

This section spotlights the problems with attempts to cabin the tribal remedies doctrine within the exhaustion of administrative remedies or forms of abstention. While the tribal remedies doctrine, crafted by the Supreme Court, shares certain characteristics with other court-created and statutory legal rules, no twin doctrine has been identified yet—and likely

---

286. THE FEDERALIST NO. 22, at 146 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (acknowledging the People as "that pure original fountain of all legitimate authority"); THE FEDERALIST NO. 49, at 339 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he people are the only legitimate fountain of power . . . .").

287. In 1924, Congress established that all Indian people are American citizens. 8 U.S.C. § 1401 (2018).

288. United States v. Mazurie, 419 U.S. 544, 557 (1975) (describing tribes as "'a separate people' possessing 'the power of regulating their internal and social relations'") (quoting United States v. Kagama, 118 U.S. 375, 381–82 (1886)).

289. *See* Montana v. United States, 450 U.S. 544, 557 (1981).

290. Ennis & Mayhew, *supra* note 17, at 429–32; *see* Greg S. Keogh, Note, *Extending Tribal Criminal Jurisdiction Outside of Indian Country:* Kelsey v. Pope, 43 AM. INDIAN L. REV. 223, 224–27 (2018–2019); Fortson, *supra* note 15, at 105–14.

291. United States v. Bryant, 136 S. Ct. 1954, 1962 (2016) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978)).

none exists. Considering how Native nations maintain a unique role in balance with the federal government and individual states, this conclusion is natural. As a result, determining whether the tribal remedies doctrine applies to state courts requires an analytical foundation separate from administrative exhaustion and abstention. The Court's decision in *Iowa Mutual* accomplishes that.

V. State Court Applicability

The language of *Iowa Mutual* and the need to support tribal sovereignty compel state courts to apply the tribal remedies doctrine. It is true that the U.S. Supreme Court, the creator of the doctrine, has not addressed state court applicability. But in the context of applying federal Indian law, with its principles and history, the next analytical step after noting that the issue is unresolved is not to fashion a new interpretation of the balance of power between tribal, state, and federal governments. Instead, when the starting point in Indian law is silence, the Supreme Court provided guidance in *Iowa Mutual*: "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact."[292] With this foundation, it is difficult to envision a path forward for finding a state court need not yield to a tribal court's determination of its own jurisdiction.[293]

Based on a straightforward interpretation of *Iowa Mutual*, the tribal remedies doctrine applies to state courts. The Court began its tribal exhaustion analysis by firmly rooting the doctrine in the federal policy of supporting tribal self-government.[294] To explain the reach of that policy, the

---

292. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 n.14 (1982)) (citing *Martinez*, 436 U.S. at 60 ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.")) ("In the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts, we decline petitioner's invitation to hold that tribal sovereignty can be impaired in this fashion.").

293. Justice Himonas makes a similar point in *Harvey*. In view of Congress' express "preference for limiting state control over Indian affairs in statutes including the Indian Child Welfare Act . . . and the Major Crimes Act," Justice Himonas stated "it would be anomalous to conclude that the tribal exhaustion rule only applies in federal court." Harvey v. Ute Indian Tribe of Uintah & Ouray Reservation, 2017 UT 75, ¶¶ 96–97, 416 P.3d 401 (Himonas, J., concurring).

294. *Iowa Mut.*, 480 U.S. at 14; *see also* El Paso Nat. Gas Co. v. Neztsosie, 526 U.S. 473, 484 (1999) ("Exhaustion was appropriate in [*National Farmers* and *Iowa Mutual*]

Court specifically pointed out that in some situations it overrides state authority.[295] For instance, whether or not a particular federal law preempts state authority, the need to promote a tribe's self-government may be a controlling consideration.[296] In this sense, the federal policy has application even where Congress has not spoken.

This language provides context to *Iowa Mutual*'s explanation of why the doctrine applies to federal question and diversity jurisdiction. The Court emphasized the danger that "unconditional access" to a federal forum would pose to tribal courts.[297] Allowing litigants to avoid a tribal court system would create "direct competition with the tribal courts, thereby impairing the [tribal courts'] authority over reservation affairs."[298] While the issue before the Court in *Iowa Mutual* focused on whether a federal forum would compete with a tribal one, the danger highlighted in *Iowa Mutual* seamlessly applies when considering a state forum and a tribal court.[299] *Iowa Mutual* confirms this itself. In cautioning against "unconditional access," the Court held that "[a]djudication of such matters by any nontribal court also infringes upon tribal law—making authority, because tribal courts are best qualified to interpret and apply tribal law."[300]

---

because 'Congress is committed to a policy of supporting tribal self-government . . . .'") (quoting Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985)).

295. *Iowa Mut.*, 480 U.S. at 14.

296. *Id.*

297. *Id.* at 16.

298. *Id.*

299. *See* Harvey v. Ute Indian Tribe of Uintah & Ouray Reservation, 2017 UT 75, ¶ 98, 416 P.3d 401 (Himonas, J., concurring) ("[T]he tribal exhaustion rule admits of no distinction between federal and state courts."); Drumm v. Brown, 716 A.2d 50, 63 (Conn. 1998) ("In our view, direct competition from state courts is equally likely to disrupt that federal policy. Because we owe no less deference to federal, statutory based policy than do the federal courts, we should be no more willing than they to risk disruption of this federal policy by exercising jurisdiction over cases to which the doctrine would apply."); Meyer & Assocs., Inc. v. Coushatta Tribe of La., 2007-2256, p. 12 (La. 9/23/08); 992 So.2d 446, 460 (Kimball, J., dissenting) ("[T]he Supreme Court has held that unconditional access to the federal forum places it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs. Certainly the same can be said of unconditional access to the state forum."); Klammer v. Lower Sioux Convenience Store, 535 N.W.2d 379, 381 (Minn. Ct. App. 1995) ("We must acknowledge that unconditional access to state court would similarly impair the tribal court's authority.").

300. *Iowa Mut.*, 480 U.S. at 16.

Opponents of applying the tribal remedies doctrine to state courts dismiss *Iowa Mutual*'s use of the phrase, "any nontribal court," as dicta.[301] But the phrase does not need to be a standalone holding to impact the application of tribal exhaustion. If it is not a holding, then it is at least an explanation of one—namely, that a permissive approach to competition with tribal courts breaches the federal policy to support tribal self-government. Accordingly, adjudication of matters subject to tribal court jurisdiction in "any nontribal court" contravenes longstanding federal policy and *Iowa Mutual*'s central holding.[302] The Solicitor General's amicus brief in *Harvey* stated a position consistent with this, that the doctrine "applies as a matter of 'federal policy' when necessary to prevent 'direct competition with the tribal courts' by 'any nontribal court'—which would appear to include a state court—on matters of tribal 'authority over reservation affairs.'"[303] Justice O'Connor's concurrence in *Hicks* provides additional support, expressly framing the doctrine as "determining the relationship between tribal courts and state and federal courts."[304]

Focusing on Justice Stevens's dissent from *Iowa Mutual*'s exhaustion analysis further supports applying the tribal remedies doctrine to state courts. Justice Stevens argued for a narrow construction of whether litigation outside the tribal courts undermines tribal self-government.[305] In Justice Stevens' view, because "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction[,]" *National Farmers* applies only when there is a pending tribal suit raising a "question concerning the jurisdiction of the [tribal court.]"[306] Justice Stevens thought that interpretation struck the right balance between the sovereignty of tribes and states.[307] But the opinion of the Court embraced a starkly different reading of *National Farmers* and a more expansive view of the tribal remedies doctrine. It is logical to infer that the Court refused to restrict the doctrine because *National Farmers* did not set forth such a limited rule and the federal policy promoting self-

301. *Harvey*, 2017 UT 75, ¶¶ 120–121 (Lee, A.C.J., concurring in part and dissenting in part).

302. *Iowa Mut.*, 480 U.S. at 16.

303. Brief for the United States as Amicus Curiae, Harvey v. UTE Indian Tribe of the Uintah & Ouray Reservation, 139 S. Ct. 784 (2019) (No. 17-1301), 2018 WL 6382963, at *12 (quoting *Iowa Mut.*, 480 U.S. at 16).

304. Nevada v. Hicks, 533 U.S. 353, 398 (2001) (O'Connor, J., concurring in part and concurring in the judgment).

305. *Iowa Mut.*, 480 U.S. at 21 (Stevens, J., concurring in part and dissenting in part).

306. *Id.* at 20–22 (Stevens, J., concurring in part and dissenting in part).

307. *Id.* at 22 (Stevens, J., concurring in part and dissenting in part).

government does not accord with Justice Stevens's view. Rather, whether or not jurisdiction is based on § 1331 or § 1332, and whether or not the tribal suit directly challenges the tribe's jurisdiction, the holdings of *National Farmers* and *Iowa Mutual* show that a hands-off approach to litigants avoiding tribal jurisdiction contradicts tribal sovereignty and federal policy. It follows that litigants may not have unconditional access to state courts when the tribe has jurisdiction, and the tribal remedies doctrine applies to state courts.

A uniform approach to applying the tribal remedies doctrine across the states is vital to tribal sovereignty. Beyond the eighteen states that addressed the doctrine, many states with tribes have yet to resolve the question of whether *National Farmers* and *Iowa Mutual* contain holdings they must follow.[308] Even before more states make their determinations, the current array of outcomes throughout the country creates a problematic situation where the sovereignty of Native nations means something different depending on location. In addition to being fundamentally unfair to Native people, allowing the arbitrariness of geography to dictate sovereignty is contrary to the federal government's trust responsibility and policy of supporting tribal self-government.

VI. Requiring a Pending Tribal Case

In contrast to the question of state court application, it is less clear whether state courts should be required to yield to tribal jurisdiction in the absence of a pending tribal case. The two leading state decisions applying the doctrine resolve this question differently. In *Harvey*, the Utah Supreme Court refused to impose this requirement,[309] but in *Drumm*, the Connecticut Supreme Court ruled that a pending action in tribal court is a prerequisite.[310] Federal courts generally do not mandate a pending tribal action before invoking the tribal remedies doctrine.[311] At least three of the states that have not adopted the tribal remedies doctrine focused on this issue and expressed

308. *See* Appendices I and II.

309. Harvey v. Ute Indian Tribe of Uintah & Ouray Reservation, 2017 UT 75, ¶¶ 42–43, 416 P.3d 401.

310. Drumm v. Brown, 716 A.2d 50, 64–66 (Conn. 1998).

311. Brief for the United States as Amicus Curiae, Harvey v. UTE Indian Tribe of the Uintah & Ouray Reservation, 139 S. Ct. 784 (2019) (No. 17-1301), 2018 WL 6382963, at *18–19 (collecting cases from the First, Ninth, and Tenth Circuits); *see also* Heldt v. Payday Fin., LLC, 12 F. Supp. 3d 1170, 1180 (D.S.D. 2014).

the view that a tribal court case is an essential ingredient.[312] Based on the interpretation of *Iowa Mutual* above, and an appreciation of the doctrine as distinct from administrative exhaustion and abstention, a pending tribal case is not necessary for applying the doctrine.

Harvey did not provide a thorough analysis of this question—it cited federal cases echoing its determination that the "doctrine does not require a case to be pending in the tribal court."[313] Federal courts largely take the view that the comity concerns expressed in *National Farmers* and *Iowa Mutual* do not depend on a concurrent tribal case.[314]

The Connecticut Supreme Court came to its conclusion in *Drumm* after a close reading of *National Farmers*, *Iowa Mutual*, and *Strate*. The *Drumm* court concluded each case "use[d] narrow language . . . indicating the presupposition of pending proceedings."[315] *Drumm* then grounded its holding in "three complementary policy considerations."[316] The court found that "the impact on a tribal court's authority of a nontribal court's adjudication of a matter over which the tribal court could, but has not, exercised jurisdiction is much more attenuated. Any such effect is speculative and indirect, consisting merely of a lost opportunity or a potential unrealized."[317] Second, relying on Connecticut law, *Drumm* pointed out that a court with jurisdiction has a "duty to adjudicate the case before it[,]" except "in an extreme, compelling situation."[318] And third, citing state law, *Drumm* gave weight to the "consideration of the traditional right of a plaintiff to select his forum."[319]

Drumm is correct that the Supreme Court's language in *National Farmers* and *Iowa Mutual* framed this issue narrowly, suggesting that the Court presupposed a pending tribal case when applying the tribal remedies

312. Coeur d'Alene Tribe v. Johnson, 405 P.3d 13, 18–19 (Idaho 2017); Harrison v. Boyd Mississippi, Inc., 700 So.2d 247, 251 n.3 (Miss. 1997); Seneca v. Seneca, 741 N.Y.S.2d 375, 379 (N.Y. App. Div. 2002).

313. *Harvey*, 2017 UT 75, ¶ 42.

314. Smith v. Moffett, 947 F.2d 442, 444 (10th Cir. 1991) ("The fact that Smith apparently has not yet presented his case to a tribal court does not diminish the comity considerations present in this case. Lower courts have held comity to be a concern even when a case filed in federal court has not yet been filed in tribal court.") (citing cases from the Eighth, Ninth, and Tenth Circuits).

315. *Drumm*, 716 A.2d at 65.

316. *Id.*

317. *Id.*

318. *Id.* (internal quotation marks omitted) (quoting Ahneman v. Ahneman, 706 A.2d 960 (Conn. 1998)).

319. *Id.* at 66 (citing Picketts v. Int'l Playtex, Inc., 576 A.2d 518 (Conn. 1990)).

doctrine.[320] The *Harvey* dissent made a parallel point, claiming the Supreme Court's cases turned on "the need to allow the 'forum whose jurisdiction is being challenged'" to address its own jurisdiction.[321] However, the Court used broad language in emphasizing the need to protect tribal sovereignty from external jurisdiction, which is the core of the doctrine.[322] *Iowa Mutual* was clear that "unconditional access" to outside dispute resolution posed a direct threat to tribal authority.[323] Access exists whether or not a tribal case is pending.

Consequently, *Drumm* is not entirely correct that the "impact on a tribal court's authority . . . is much more attenuated"[324] because *Iowa Mutual* broadly articulated its determination that "unconditional access" to nontribal courts will undermine tribes.[325] Similarly, the *Harvey* dissent takes a view toward the doctrine that is too restricting.[326] *Iowa Mutual*'s majority foreclosed such a position in its rejection of Justice Stevens' confining interpretation of whether nontribal litigation undercuts tribal self-government. When, on one hand, there is narrow language the Supreme Court used in prior cases, and, on the other hand, the comity concerns at the heart of the doctrine are still applicable, resolving the tension in favor of comity accords with the doctrine's spirit. As federal courts have found, "[t]he fact that [a party] has not yet presented his case to a tribal court does not diminish the comity considerations present" in federal court.[327]

The second policy rationale identified in *Drumm* is not on point when it comes to the tribal remedies doctrine.[328] When a court analyzes the

---

320. *Id.* at 65.

321. Harvey v. Ute Indian Tribe of Uintah & Ouray Reservation, 2017 UT 75, ¶ 138, 416 P.3d 401 (Lee, A.C.J., concurring in part and dissenting in part) (quoting Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985)).

322. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987); *Harvey*, 2017 UT 75, ¶ 98 (Himonas, J., concurring).

323. 480 U.S. at 16.

324. *Drumm*, 716 A.2d at 65.

325. *Iowa Mut.*, 480 U.S. at 16.

326. *Harvey*, 2017 UT 75, ¶¶ 138–140 (Lee, A.C.J., concurring in part and dissenting in part) (citing *National Farmers*, 471 U.S. at 856).

327. Smith v. Moffett, 947 F.2d 442, 444 (10th Cir. 1991).

328. Justice Himonas's concurrence in *Harvey* provides a thoughtful response to the third policy rationale identified in *Drumm*—deferring to the plaintiff's choice of forum. Answering the *Harvey* dissent's claim that tribal exhaustion "overrid[es]" the right to "self-governance" by disregarding an Indian litigant's forum choice, Justice Himonas explained, "The 'self-governance' that the tribal exhaustion doctrine seeks to promote is the self-governance that comes from encouraging the development of tribal judicial institutions; it is

doctrine, the starting point is assessing whether there is tribal jurisdiction over the case; it is not the nontribal court's "unflagging obligation" to resolve the case, which is how abstention rules function.[329] Similarly, the tribal remedies doctrine does not control when the case fits within an exception the Supreme Court created, but in the abstention context, the nontribal court's decision to abstain is the exception. As discussed earlier, the history and unique role of tribes in relation to state and federal governments set the tribal remedies doctrine apart from other traditional rules of court jurisdiction.[330] With a majority of the policy reasons presented in *Drumm* and echoed in the *Harvey* dissent falling short of showing the necessity of a pending case in tribal court, and because imposing such a rule contravenes *Iowa Mutual*, the absence of a tribal case is not an obstacle to applying the doctrine.

Arguing in favor of requiring a pending tribal case, the Solicitor General's amicus brief in *Harvey* asserted that, absent a tribal suit, there is no conflict with tribal courts because *Williams v. Lee* curbs any problematic competition.[331] The government accurately points out that state courts are capable of hearing a variety of tribe-related disputes: issues of reservation access that arise out of Indian Country; claims a tribal member brings against a non-Indian person, even those arising in Indian Country; and cases touching on a tribe's interests and involving interpretations of tribal law.[332] While the tribal remedies doctrine prioritizes the protection of tribal authority, it is important not to lose sight of the tribe-related matters that state courts can handle and the safeguard established in *Williams v. Lee*.

The government's line of reasoning offers a solid argument for allowing states to demand a tribal case before applying the doctrine. However, if a state court adopts that view, it should also consider another aspect of the government's argument. As somewhat of a hybrid position, the Solicitor General proposed allowing the state court to hold on to claims properly before it and peel off specific claims or questions for the tribal court to address—"in a manner analogous to the principles of primary jurisdiction

---

not the policy of allowing litigants to choose their own forum." *Harvey*, 2017 UT 75, ¶ 108 n.3 (Himonas, J., concurring).

329. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

330. *See supra* Part IV.

331. Brief for the United States as Amicus Curiae, Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation, 139 S. Ct. 784 (2019) (No. 17-1301), 2018 WL 6382963, at *12–13 (citation omitted).

332. *Id.* at *13.

or certification of state-law issues to a state court."[333] This view respects both the essence of the tribal remedies doctrine and the legitimate role state courts have in certain cases encompassing tribal law questions and claims arising on reservations.[334]

VII. Conclusion

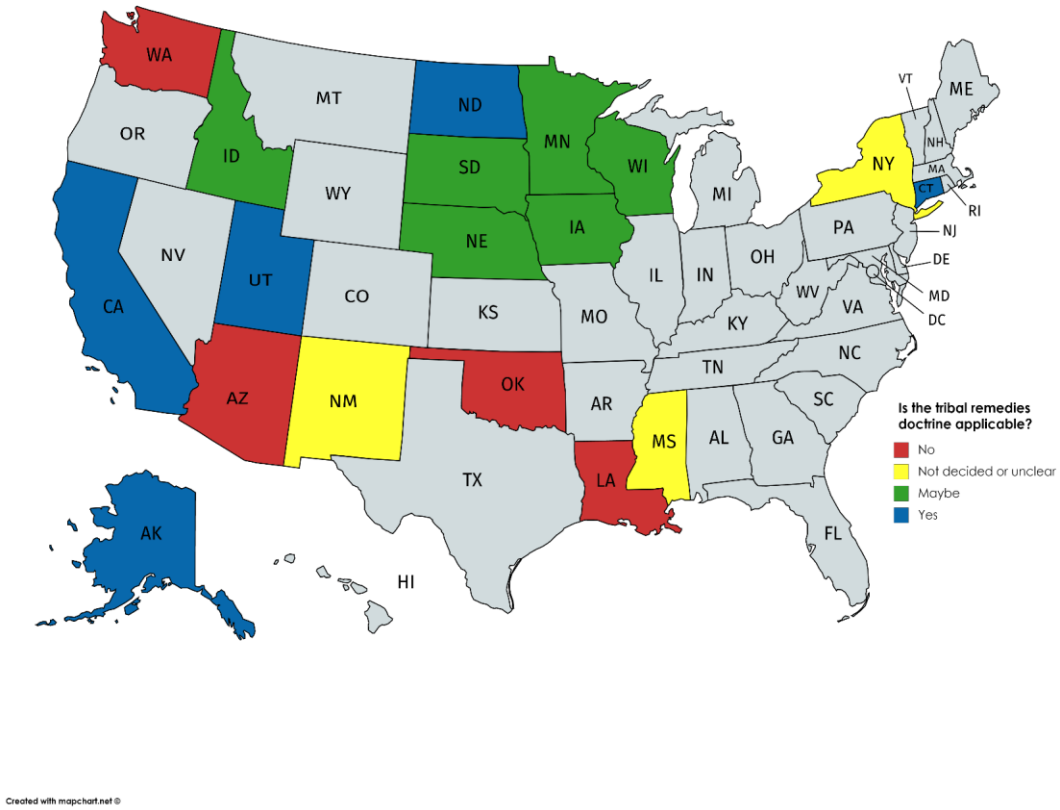
Whether it is federal, state, or tribal, a court or dispute resolution system is indispensable to a sovereign's rule of law and cultural preservation. Because the current legal landscape in the United States permits individual state courts to decide whether to apply the tribal remedies doctrine, the authority of tribal courts varies throughout the country. Considering the importance of courts in Native nations, that result is not acceptable. Supreme Court precedent, specifically *Iowa Mutual*, requires state courts to apply the tribal remedies doctrine. Separating the doctrine from the legal rules of administrative exhaustion and abstention confirms this conclusion and reveals that a pending tribal court action is not required before applying the tribal remedies doctrine in state courts.

333. *Id.* at *21.

334. A follow-up issue is whether the tribal remedies doctrine itself mandates this piecemeal approach, or whether states are free to implement it if they choose. Because the Supreme Court's cases on the doctrine do not get close to this narrow issue, it may be best left to the states.

Appendix I

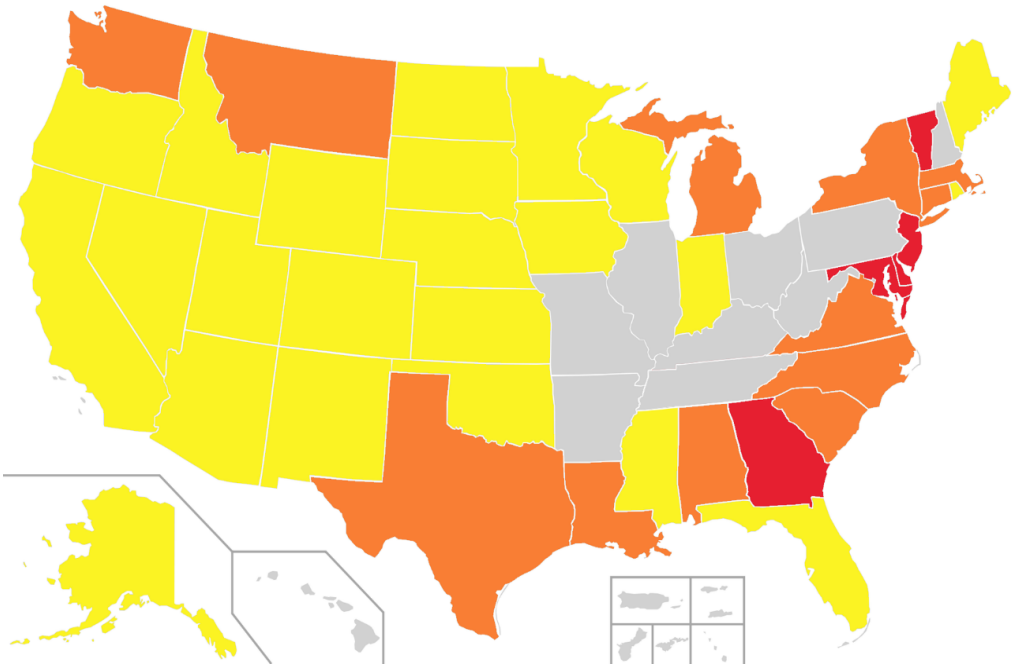
State Courts That Have Addressed the Tribal Remedies Doctrine[335]



335. The states shown in gray have not addressed the tribal remedies doctrine.

Appendix II

Distinguishing between states and territories with: (1) federally recognized tribes only; (2) state-recognized tribes only; (3) both federally and state-recognized tribes; and (4) neither.[336]



Yellow—Federal only *Red*—State only

Orange—Federal and state *Grey*—Neither

336. *List of Federally Recognized Tribes by State*, MASS. CTR. FOR NATIVE AM. AWARENESS, http://www.mcnaa.org/uploads/1/2/6/5/12656184/federally_recognized_tribes_by_state.pdf (last visited Aug. 2, 2019).